No. 90-1599-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Frank Dennis Felix

Docketed:
April 15, 1991

Court: United States Court of Appeals
for the Tenth Circuit

Vide:
90-1527

Counsel for petitioner: Solicitor General

Counsel for respondent: Anderson,Scott

See also:
90-1527
90-1689
90-7857
90-8044
91-657

Entry	Date	Note	Proceedings and Orders
1	Apr 15 1991	G	Petition for writ of certiorari filed.
2	May 21 1991		DISTRIBUTED. June 6, 1991
3	Jun 3 1991	P	Response requested -- CJ. (Due July 3, 1991)
4	Jul 3 1991		Brief of respondent Frank Dennis Felix in opposition filed.
5	Jul 10 1991		REDISTRIBUTED. September 30, 1991
6	Oct 7 1991		Petition GRANTED.
			**********
7	Oct 21 1991	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
8	Nov 4 1991		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
9	Nov 13 1991		Record filed.
		*	Certified record and proceedings U.S.C.A.-Tenth Circuit and U.S.D.C.-Oklahoma. (1 BOX)
10	Nov 20 1991		SET FOR ARGUMENT TUESDAY, JANUARY 14, 1992. (1ST CASE)
11	Nov 21 1991		Brief of petitioner United States filed.
13	Dec 12 1991		CIRCULATED.
14	Dec 23 1991	X	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
15	Dec 23 1991	X	Brief of respondent Frank Dennis Felix filed.
16	Jan 7 1992	X	Reply brief of petitioner United States filed.
17	Jan 7 1992		Record filed.
		*	LODGING BY Solicitor General. 1 copy of transcript of hearing of November 30, 1967.
18	Jan 14 1992		ARGUED.

90-1599

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DENNIS FELIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant may be prosecuted for conspiracy to violate several narcotics statutes after previously having been prosecuted for conduct alleged in some of the overt acts of the conspiracy charge.

2. Whether prosecution of respondent for narcotics offenses in connection with the operation of a narcotics laboratory in Oklahoma is barred because he was previously prosecuted for attempting to set up a narcotics laboratory in Missouri, where evidence of his conduct with respect to the Oklahoma laboratory had been introduced in the Missouri prosecution as evidence of his intent to commit the Missouri offense.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DENNIS FELIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-40a) is reported at 926 F.2d 1522. The decision of the district court (App., *infra*, 41a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. On September 15, 1987, respondent was indicted in the Western District of Missouri for attempting to manufacture methamphetamine from on or about August 26, 1987, to on or about August 31, 1987, in violation of 21 U.S.C. 846. App., *infra*, 62a-63a. He was convicted and his conviction was affirmed by the Eighth Circuit. *United States* v. *Felix*, 867 F.2d 1068 (1989).

At respondent's trial on the Missouri indictment, the government introduced evidence that on August 26, 1987, respondent had met with George Dwinnells, who was employed by a supplier of scientific equipment and, unbeknownst to respondent, was a DEA informant. Dwinnells testified that respondent sought to purchase chemicals and equipment needed to make methamphetamine. Respondent made a down payment of $7,500 toward the purchase and gave Dwinnells instructions for securing a trailer to transport the merchandise. In later telephone conversations, respondent increased his order for chemicals and equipment and instructed Dwinnells to deliver the items to a Joplin, Missouri, hotel, on August 31, 1987. Dwinnells met respondent at the hotel on the designated date. Respondent was arrested after inspecting the chemicals and equipment and hitching the trailer in which Dwinnells had transported them to his own car. 867 F.2d at 1070-1071.

At trial in the Missouri case, the government introduced evidence that respondent had been involved earlier in 1987 in manufacturing methamphetamine in Oklahoma. See 867 F.2d at 1072-1073. That evidence showed that during the Spring of 1987 respondent had furnished government witness Paul Roach with chemicals and materials for making methamphetamine in exchange for lessons on how to "cook"—*i.e.*, produce—the drug. Roach testified that he and respondent had used the chemicals and equipment to manufacture methamphetamine in a trailer near Beggs, Oklahoma. On July 13, 1987, law enforcement agents seized the unattended trailer, but they did not arrest respondent at that time. 867 F.2d at 1070-1071.

The trial court instructed the jury that the evidence of the Oklahoma transactions could not be used "to decide whether [respondent] carried out the physical acts involved in the crime charged here." See 867 F.2d at 1075. Instead, it was admitted to show respondent's state of mind with respect to the chemicals he arranged to have delivered in Missouri. Respondent's defense had been that "he never had criminal intent, but had been acting under the mistaken belief that he was working in a covert DEA operation." 867 F.2d at 1074. In that context, the Eighth Circuit found the evidence concerning the methamphetamine laboratory in Oklahoma to be "highly probative of [respondent's] knowledge and intent," and thus admissible under Fed. R. Evid. 404(b). 867 F.2d at 1073.

2. On February 16, 1989, respondent was named in eight counts of an 11-count indictment filed in the Eastern District of Oklahoma. App., *infra*, 51a-61a. Count 1 charged that he conspired in the Eastern District of Oklahoma and elsewhere between May 1, 1987, and August 31, 1987, to manufacture, possess, and distribute methamphetamine, in violation of 21

U.S.C. 846. Respondent was named in nine of the 18 overt acts that the indictment charged had been committed "[t]o effect the objects of the conspiracy." Two of the nine overt acts in which respondent was named took place within the time period of the Missouri indictment. Overt act 17 charged that "[o]n August 26, 1987, [respondent], while in Tulsa Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine." App., *infra*, 55a. Overt act 18 charged that "[o]n August 31, 1987, [respondent], while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." *Ibid.*

Respondent was also named in seven substantive counts. Counts 2 through 5 charged that, in violation of 21 U.S.C. 841(a)(1), respondent had on or about July 13, 1987, in the Eastern District of Oklahoma, manufactured methamphetamine (Count 2), possessed methamphetamine with intent to distribute it (Count 3), possessed methamphetamine oil with intent to manufacture methamphetamine (Count 4), and manufactured phenylacetone (Count 5). App., *infra*, 55a-57a. Count 6 charged that, between June 1, 1987, and July 13, 1987, in the Eastern District of Oklahoma, respondent maintained a place and enclosure for manufacturing methamphetamine, in violation of 21 U.S.C. 856. App., *infra*, 57a. Counts 9 and 10 charged that, on or about June 21, 1987 (Count 9) and July 13, 1987 (Count 10), respondent traveled from Texas to the Eastern District of Oklahoma with intent to promote the manufacture of methamphetamine and thereafter attempted to promote such activity, in violation of 18 U.S.C. 1952. App., *infra*, 59a-60a.

At trial, the government introduced much of the same evidence that had been introduced in the Missouri trial pursuant to Rule 404(b). Respondent was convicted on all counts and sentenced to serve concurrent 20-year terms of imprisonment on Counts 1 through 6 and five-year terms of imprisonment on Counts 9 and 10. The 20-year sentence imposed for the Oklahoma offenses was set to run consecutively to the sentence imposed for respondent's Missouri conviction.

3. A divided panel of the Tenth Circuit reversed respondent's convictions on Counts 1 through 6 and affirmed his convictions on Counts 9 and 10.

a. Writing for the majority, Chief Judge Holloway first addressed the relationship between this Court's recent decisions in *Dowling* v. *United States*, 110 S. Ct. 668 (1990), and *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990). In *Dowling*, this Court held that the Double Jeopardy Clause did not bar the government from introducing relevant evidence in a bank robbery prosecution even though that evidence had been the subject of a previous prosecution for burglary, assault, and related offenses in which the defendant had been acquitted. In *Grady*, this Court held that a second prosecution was barred where "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant had already been prosecuted." 110 S. Ct. at 2093. Noting that *Dowling* "concerned * * * the admissibility of evidence in conformity with the collateral estoppel principle of *Ashe* [v. *Swenson*, 397 U.S. 436 (1970)]," while "*Grady* concerned the protection afforded by the Double Jeopardy Clause from successive prosecutions for the same conduct," Chief Judge

Holloway held that "[i]t is this latter protection * * * which is implicated here and this causes us to focus mainly on the teaching of *Grady*." App., *infra*, 14a.

As to the conspiracy count in the current indictment, the court followed the Second Circuit's recent holding in *United States* v. *Calderone*, 917 F.2d 717 (1990), petition for cert. pending, No. 90-1527, that, for purposes of applying *Grady* to a conspiracy charge, it is the conduct from which the jury is asked to infer a conspiratorial agreement—rather than the agreement itself—that is considered to be the conduct for which the defendant is prosecuted. App., *infra*, 13a. The court then summarized the proof presented in the Missouri trial, as recounted by the Eighth Circuit, and concluded that "[a]s to Count 1, the conspiracy charge, the duplication was extensive." *Id.* at 15a.

Specifically, the court pointed out that in both trials the government proved respondent's course of conduct in learning to make methamphetamine and setting up the Oklahoma lab. Further, in both trials the government proved that, after the raid on the Oklahoma lab, respondent had purchased chemicals and equipment for setting up a new lab and had taken delivery of those materials in Joplin, Missouri. The court noted that respondent's conduct in arranging for the purchase of the chemicals and equipment and receiving delivery of them were listed as overt acts in the Oklahoma conspiracy count. App., *infra*, 15a-17a. The court also noted that both the Missouri indictment and the Oklahoma conspiracy count focused on the actions of respondent and Roach, and that both the Missouri and Oklahoma charges alleged conduct that took place outside their respective States. Finally,

the court found that "the relevant time frames of the two indictments also overlap" (*id.* at 18a); the court stated that "[t]he Missouri prosecution was premised on conduct that occurred from the spring of 1987 to August 31, 1987," while the Oklahoma conspiracy count charged conduct that occurred from approximately May 1, 1987 to August 1, 1987. *Ibid.* Based on those facts, the court of appeals concluded that the Oklahoma conspiracy count charged "the same conduct for which [respondent] was previously convicted in Missouri" and that prosecution on the Oklahoma conspiracy charge was therefore barred by the Double Jeopardy Clause. *Ibid.*

With respect to the substantive offenses charged in Counts 2 through 6, the court noted that in both trials the government proved that respondent had bought chemicals and equipment to manufacture methamphetamine, that he had used those chemicals to produce methamphetamine at the Beggs, Oklahoma, trailer, and that the trailer had subsequently been seized by law enforcement authorities. App., *infra*, 18a-19a. That evidence was used to show intent in the Missouri trial[1] and as direct evidence of the Oklahoma charges. Because the government relied on the same evidence to establish critical elements in each case, the court of appeals concluded that re-

[1] The court of appeals was mistaken in stating that evidence of respondent's conduct in connection with the Beggs lab was used in the Missouri prosecution to "establish[]" the "substantial step" element of the attempt offense. App., *infra*, 17a; see also *id.* at 20a. Compare 867 F.2d at 1071. As Judge Anderson noted, the Missouri jury was specifically instructed that the Rule 404(b) evidence relating to the Beggs lab could be used only "on the question of motive, opportunity, preparation, plan, knowledge, identity or absence of mistake." App., *infra*, 26a.

spondent's convictions on Counts 2 through 6 had to be reversed. *Id.* at 18a-20a.

Finally, the court affirmed respondent's convictions on Counts 9 and 10, charging travel on June 21 and July 13, 1987, respectively, from Texas to Oklahoma to promote the manufacture of methamphetamine. According to the court, the conduct alleged in those counts was not sufficiently closely related to the conduct proved in the Missouri trial to require that his convictions under those counts be reversed under the Double Jeopardy Clause. App., *infra*, 20a-21a.

b. Judge Anderson dissented from the dismissal of the first 6 counts of the Oklahoma indictment. He stated that even after *Grady*, a mere overlap of proof in two prosecutions does not establish that the second prosecution is barred by the Double Jeopardy Clause. App., *infra*, 23a & n.1. According to Judge Anderson, *Grady* requires instead a showing that (1) the conduct sought to be proved in the second prosecution "constitutes an offense for which the defendant has already been prosecuted," and (2) the conduct is "being proven to establish an essential element" of the second prosecution. App., *infra*, 24a. In Judge Anderson's view, that test, if applied correctly, would not require reversal of any of respondent's convictions.

The conduct charged in the conspiracy count, Judge Anderson argued, did not "constitute an offense for which the defendant has already been prosecuted." Judge Anderson noted that the Missouri indictment alleged conduct only "[f]rom on or about August 26, 1987, to on or about August 31, 1987." App., *infra*, 30a. Although the government had introduced evidence in the Missouri trial of respondent's conduct prior to August 26, 1987, that evidence had been introduced only pursuant to Rule 404(b). In Judge

Anderson's view, respondent was not prosecuted for that conduct in the Missouri case. App., *infra*, 30a.

Judge Anderson further argued that although the Oklahoma conspiracy count contained two overt acts that related directly to the Missouri offense, the inclusion of those overt acts did not convert the Oklahoma conspiracy into the "same offense" as the attempt for which respondent was prosecuted in Missouri. An attempt, he explained, consists of two elements—intent and a substantial step toward commission of the offense—and the proof that established the overt acts in the conspiracy indictment at most established the "substantial step" element of the attempt offense. App., *infra*, 31a. In this respect, Judge Anderson disagreed with Judge Newman's statement in *Calderone* that *Grady* bars a subsequent prosecution in which conduct constituting an element of a prior offense—as opposed to the entirety of the prior offense—must be proved. App., infra, 32a.

With respect to the substantive counts, Judge Anderson noted that each of them "was based on [respondent's] conduct on or before July 13, 1987, in establishing and operating the methamphetamine lab in Beggs, Oklahoma." App., *infra*, 25a. In contrast, the Missouri count alleged conduct that took place more than a month later, on August 26-31, 1987. Although the government had introduced evidence in the Missouri trial concerning respondent's pre-August conduct, Judge Anderson stated that introducing evidence of a prior bad act under Rule 404(b) "is not prosecution for that act." App., *infra*, 26a. In Judge Anderson's view, the court of appeals' conclusion to the contrary conflicted with this Court's analysis in the *Dowling* case. App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

This case presents important issues that merit this Court's review. The Tenth Circuit in this case reached the remarkable conclusion that a prosecution of respondent for attempting to set up one methamphetamine lab barred his subsequent prosecution for a number of offenses relating to his operation of a separate methamphetamine lab. The court was able to reach that conclusion only by making serious errors in applying the principles of double jeopardy law.

First, the court departed from the well-settled principle that the gravamen of a charge of criminal conspiracy is that the defendant entered into an agreement with others to accomplish criminal objectives. Instead of recognizing that the "conduct" at issue in a conspiracy prosecution is thus the agreement, the court held that the "conduct" at issue in such a case is the acts of the defendant from which the government intends to ask the jury to infer the conspiratorial agreement. The court's decision on that point is in direct conflict with a recent decision of the Fourth Circuit and is in tension with the reasoning of a recent Eleventh Circuit decision as well.

Second, the court held that the introduction of "similar act" evidence to establish a defendant's intent bars a separate prosecution of the defendant for committing those similar acts. That holding departs substantially from well-established principles regarding the use of "similar act" evidence.

Both holdings have the effect of upsetting settled doctrine that the government may, in a variety of settings, introduce evidence that a defendant has engaged in criminal conduct other than that which is specifically charged in the indictment without losing the opportunity to prosecute the defendant for that

conduct separately. Further review is therefore warranted on both issues.

1. The court of appeals held that respondent's conspiracy conviction in Oklahoma was a "successive prosecution[] for the same conduct for which [respondent] was previously convicted in Missouri," and was therefore barred by the Double Jeopardy Clause. App., *infra*, 18a.

The Tenth Circuit did not bar the conspiracy charge on the ground that the agreement that formed the basis for the Oklahoma conspiracy charge was the same as an agreement alleged and proved in the Missouri case. Because the Missouri prosecution involved a charge of attempt, not conspiracy, no agreement was alleged or proved in the Missouri prosecution. Rather, the court's decision that the conspiracy count was jeopardy-barred rested on its holding that the offense being prosecuted under the conspiracy count consisted of conduct from which the government sought to have the jury infer the defendant's participation in the conspiracy. Since that conduct consisted in part of conduct that had previously been proved in the course of the Missouri case, the court of appeals concluded that the Oklahoma and Missouri offenses were "the same offense" for double jeopardy purposes.

The court of appeals' analysis is at odds with the law of conspiracy. "The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *United States* v. *Braverman*, 317 U.S. 49, 53 (1942). Accord *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (agreement "is all but synonymous" with conspiracy); *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). Because a criminal conspiracy poses special dangers to society," independently of any

other evil it seeks to accomplish," *Dennis* v. *United States*, 341 U.S. 494, 573 (1951) (Jackson, J., concurring), an individual who joins a conspiracy is liable for his participation in the criminal agreement in addition to any liability he may have for committing the substantive crimes that are the objects of the conspiracy. In other words, a conspiracy is not "the same offense" as its object offenses. See *Garrett* v. *United States*, 471 U.S. 773, 778 (1985); *Iannelli* v. *United States*, 420 U.S. 770, 781-782 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946). Accordingly, the government may prosecute a defendant separately for a substantive offense and for conspiracy to commit that offense. See, *e.g.*, *United States* v. *Bayer*, 331 U.S. 532, 542-543 (1947); *United States* v. *Guthrie*, 789 F.2d 356, 358 (5th Cir. 1986); *United States* v. *Hines*, 713 F.2d 584, 586 (10th Cir. 1983); *United States* v. *Snell*, 627 F.2d 186, 188 (9th Cir. 1980), cert. denied, 450 U.S. 957 (1981); *United States* v. *Brown*, 604 F.2d 557, 559 (8th Cir. 1979); *United States* v. *Bosch*, 584 F.2d 1113, 1118-1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 919 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Ricco*, 549 F.2d 264, 273 (2d Cir.), cert. denied, 431 U.S. 905 (1977).

Contrary to settled precedent, the court of appeals' decision in this case would require the government to prosecute a conspiracy and all substantive offenses that come within it in the same prosecution. If any substantive offense committed in furtherance of the conspiracy were prosecuted separately—even a substantive offense that included no element of agreement and required the government to prove only the conduct of a single individual—the government would lose the opportunity to prosecute the conspiracy later, or at least to introduce evidence concerning the previously prosecuted substantive offense. Presumably, the same result would follow if the order of prosecutions were reversed; prosecution for the conspiracy would immunize the defendant from later prosecution for any substantive offense evidence of which was introduced to help prove the conspiratorial agreement.

The court of appeals' ruling on that issue squarely conflicts with the decision of the Fourth Circuit in *United States* v. *Clark*, No. 90-5771 (Mar. 20, 1991). In *Clark*, the defendant was found in constructive possession of a suitcase containing cocaine and heroin. He was first tried and convicted for the substantive offenses of possessing cocaine and heroin with intent to distribute them. Seven months after his conviction on those counts, he was indicted for conspiring to possess and distribute cocaine and heroin, in violation of 21 U.S.C. 846. The Fourth Circuit noted that "[the defendant's] possession of drugs at the airport, the same conduct for which he had been convicted earlier, was alleged as overt act number 18 in the conspiracy indictment and evidence about the airport incident was introduced at [the conspiracy] trial." Slip op. at 3. Nonetheless, the Fourth Circuit upheld the defendant's conviction over his objection that the conspiracy charge was barred under *Grady* v. *Corbin*, because the offenses for which he was convicted in his first trial were alleged and proved as an overt act in his subsequent conspiracy prosecution. The analysis and result in *Clark* cannot be squared with the analysis and result in this case.

Other circuits as well have had difficulty in discerning the effect of this Court's decision in *Grady* v. *Corbin* on the law of conspiracy. The Second Circuit has taken the same position as does the Tenth Circuit in this case—that the "conduct" at issue in a conspiracy prosecution is not the agreement itself, but is the conduct from which the government asks the jury to infer the existence of an agreement. See *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527; *United States* v. *Gambino*, 920 F.2d 1108, 1112 (2d Cir. 1990). The Eleventh Circuit, on the other hand, has disagreed with the position adopted by the courts of appeals in this case and in *Calderone*. In *United States* v. *Gonzalez*, 921 F.2d 1530, 1538 (11th Cir. 1991), the court distinguished *Calderone* in a RICO conspiracy case, holding that the "conduct" in a RICO conspiracy case was the defendant's agreement, while the "conduct" charged in a previous prosecution for substantive narcotics offenses was the "criminal activity of the importation and distribution of contraband substances."[2] As the Eleventh Circuit noted, "[t]he mere fact that [the agreement and the substantive conduct] are part of the same 'transaction' or can be proven by the same 'evidence' is not sufficient to bar successive prosecutions under the language in *Grady*." *Ibid.* See also *United States* v. *Esposito*, 912 F.2d 60, 65 (3d Cir. 1990).

[2] Because *Gonzalez* was a RICO conspiracy case, and *Calderone* involved a drug conspiracy, the Eleventh Circuit merely "distinguish[ed] the dicta underlying *Calderone*" (921 F.2d at 1539) and found it unnecessary to decide whether it disagreed with the result in *Calderone*. The Eleventh Circuit noted, however, that "the Second Circuit would appear to disagree with part of our holding above * * * that the conspiratorial agreement and any actions in furtherance of it, are in fact distinguishable conduct." 921 F.2d at 1538 n.12.

The courts of appeals are thus in disagreement over the effect of *Grady* on longstanding principles of conspiracy law and the well-settled legal doctrine permitting the successive prosecution of a conspiracy and the substantive offenses committed pursuant to that conspiracy. Review by this Court is warranted to resolve that conflict.

2. In addition to reversing respondent's conspiracy conviction, the court of appeals also reversed his convictions on five of the substantive counts. None of those counts charge respondent with a conspiracy, and the court's decision with respect to those counts thus does not depend on its holding concerning the "conduct" at issue in a conspiracy prosecution. Rather, the court based its holding on the fact that the conduct charged in those substantive counts had been the subject of evidence introduced against respondent under Rule 404(b) in the Missouri prosecution.

In *Dowling* v. *United States*, 110 S. Ct. 668 (1990), this Court held that evidence of a crime of which a defendant has been acquitted may be introduced against the defendant in a later prosecution for another offense. That principle dictates the result here: that two crimes do not become the "same offense" for double jeopardy purposes merely because the evidence that establishes the first crime is also relevant to prove the second.

To be sure, there are two possible distinctions between *Dowling* and this case. First, *Dowling* involved a prior acquittal, while this case involves a prior conviction. Yet, that distinction suggests that the result in this case should follow *a fortiori* from the result in

Dowling. *Dowling* held that the government may use evidence that was introduced in a prior prosecution of the same defendant, in which the defendant had been *acquitted*; surely it follows that the government may use evidence that was introduced in a prior prosecution in which the same defendant had been *convicted*.

Second, in *Dowling* the defendant was first prosecuted for the prior act of misconduct and then prosecuted for other conduct of which the prior misconduct was merely relevant evidence. In this case, the order of the prosecutions was reversed. Yet that distinction, too, does not suggest any real difference between this case and *Dowling*. If, as in *Dowling*, evidence of conduct for which a defendant has already been prosecuted may be introduced at a later trial on another charge, then evidence of conduct for which the defendant has never been prosecuted, but which has been introduced in a prior trial of the same defendant, is surely admissible in a later trial for that conduct. The underlying principle in both cases is that the introduction of relevant evidence of particular misconduct is not the same thing as prosecution for that conduct. As Judge Anderson explained (App., *infra*, 29a n.6), any suggestion to the contrary is inconsistent with this Court's holding in *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988), that a jury may accept similar act evidence if it "can reasonably conclude that the act occurred and that the defendant was an actor"—a standard substantially lower than the "beyond a reasonable doubt" standard that governs the jury's findings that a defendant committed the acts charged in a criminal indictment.

The decision in this case is therefore inconsistent with *Dowling*, as well as with the numerous pre-

Dowling appellate decisions that reached the same result as *Dowling*,[3] and it is erroneous unless *Grady* v. *Corbin* has effectively overruled *Dowling*. We agree with Judge Anderson that *Grady* has had no such effect. If *Grady* is interpreted to foreclose prosecution for an offense simply because evidence of the commission of that offense was relevant to a prosecution for a different crime, the double jeopardy rule of *Grady* will have been converted into a version of the "same evidence" test: to avoid the bar of double jeopardy, the government will have to avoid any reference in one prosecution to acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution. That is a result that the Court in *Grady* appears to have disclaimed. See 110 S. Ct. at 2093 & n.12 ("[T]he presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding."). Nonetheless, the breadth of that disclaimer is subject to debate, as the conflicting opinions in this case indicate. Review by this Court is needed to resolve this important issue of double jeopardy law.

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[3] See, *e.g.*, *Flittie* v. *Solem*, 775 F.2d 933, 942 (8th Cir. 1985) (en banc), cert. denied, 475 U.S. 1025 (1986); *United States* v. *Castro-Castro*, 464 F.2d 336 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); *United States* v. *Van Cleave*, 599 F.2d 954, 957 (10th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1991

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-7058

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

FRANK DENNIS FELIX, DEFENDANT-APPELLANT.

[Filed Feb. 28, 1991]

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 89-16-CR)

Before HOLLOWAY, Chief Judge, SEYMOUR and ANDERSON, Circuit Judges.

HOLLOWAY, Chief Judge.

In No. 89-7058, defendant Felix appeals his conviction in the United States District Court, Eastern District of Oklahoma, on various counts of a multi-count indictment charging him, *inter alia*, with con-

spiracy, manufacture, and possession with intent to distribute methamphetamine. He alleges that this conviction forced him to "run the gauntlet" again following a previous conviction in the United States District Court, Western District of Missouri, for a single count of attempt-to-manufacture methamphetamine, in violation of the protections afforded by the Double Jeopardy Clause as recently construed in *Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084 (1990). We agree that Felix has shown that his conviction on several counts in the Oklahoma trial entailed impermissible successive prosecutions for conduct underlying his Missouri conviction, and therefore we reverse his conviction on particular counts as enumerated below.

I

Defendant Felix was convicted following a jury trial in the Eastern District of Oklahoma for violations of 21 U.S.C. §§ 846 and 841(a)(1) ("the Oklahoma trial").[1] He had previously been convicted in

[1] On February 16, 1989, Felix was named in an eleven count indictment. The specific charges against Felix were as follows:

Count 1 charged Felix and others with conspiring to knowingly and intentionally manufacture methamphetamine; to knowingly and intentionally possess the same with intent to distribute; and to knowingly and intentionally distribute the same drug. This conspiracy was alleged to have occurred from on or about May 1, 1987, continuously to on or about August 31, 1987, in the Eastern District of Oklahoma and elsewhere;

Count 2 charged Felix and others with unlawfully, knowingly and intentionally manufacturing methamphetamine on or about July 13, 1987, in the Eastern District of Oklahoma:

Count 3 alleged that Felix and others possessed with intent

the Western District of Missouri on a single count of attempt-to-manufacture methamphetamine, in violation of §§ 841(a)(1) and 846, ("the Missouri trial").[2] Both convictions arose from the following course of conduct and events:

to distribute five and a quarter pounds of methamphetamine on or about July 13, 1987;

Count 4 charged that Felix and others on or about July 13, 1987, knowingly and intentionally possessed approximately four gallons of methamphetamine oil with intent to manufacture methamphetamine;

Count 5 alleged that Felix and others on July 13, 1987, manufactured phenylacetone;

Count 6 alleged that Felix and codefendant Pinter from on or about June 1, 1987 to on or about July 13, 1987, in the Eastern District of Oklahoma, maintained and/or made available a place and enclosure for manufacturing methamphetamine/amphetamine;

Count 9 alleged that on or about June 21, 1987, in the Eastern District of Oklahoma and elsewhere, Felix traveled in interstate commerce from Texas to the Eastern District of Oklahoma and elsewhere with intent to promote, etc. the manufacture of methamphetamine/amphetamine; and thereafter attempted to promote, etc. the management, establishment, etc. of the manufacture of methamphetamine/amphetamine;

Count 10 charged that on or about July 13, 1987, in the Eastern District of Oklahoma and elsewhere, Felix willfully traveled in interstate commerce from Texas to the Eastern District of Oklahoma and elsewhere with [*sic*] intent to promote, etc. the promotion, or carrying on manufacture by traveling from Texas to the Eastern District of Oklahoma, and thereafter attempted to promote, etc. the promotion, etc. the manufacture of methamphetamine.

Defendant Felix was convicted on all these counts and received lengthy sentences.

[2] The single count Missouri indictment, dated September 15, 1987, charged Felix with attempting to manufacture meth-

Sometime in the Spring of 1987, a meeting (or meetings) between defendant Felix and unindicted co-conspirator Paul Roach resulted in an agreement whereby Felix would provide financing and other support to Roach, in exchange for Roach's instruction and assistance in "cooking" methamphetamine. A laboratory for the illegal enterprise was established in mobile trailers parked on an oil lease near Beggs, Oklahoma.

Felix and Roach obtained the chemicals and equipment for the Beggs lab in Tulsa, from George Dwinnells, a DEA confidential informant operating out of Tulsa Scientific, a chemical company. As a result of information provided by Dwinnells, the DEA seized the unattended Beggs lab on July 13, 1987, while a "cook" was in progress. Seized at the site were methamphetamine oil, illegal precursor chemicals, manufacturing equipment, and other evidence, some of which inculpated Felix.

Shortly thereafter, Felix phoned Dwinnells and arranged a meeting in a Tulsa bar. At the bar, under the observation of DEA agents, Felix ordered more chemicals and equipment from Dwinnells, secured by a $7,500 down payment. At Felix' behest, Dwinnells transported the newly purchased chemicals and equipment by trailer to a hotel in Joplin, Missouri. Under the watchful eyes of the DEA, tipped off by Dwinnells, a controlled transfer of the trailer and its contents to Felix occurred. He was arrested shortly thereafter.

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amphetamine from on or about August 26, 1987, to on or about August 31, 1987, in the Western District of Missouri and elsewhere. Felix' conviction on this single count conviction was affirmed by the Eighth Circuit in *United States v. Felix*, 867 F.2d 1068 (8th Cir. 1989).

Felix was tried before a jury on the attempt-to-manufacture charge in Springfield, Missouri on November 30, 1987 and convicted. Before his April 1989 Oklahoma jury trial, Felix moved to dismiss the instant indictment on double jeopardy grounds arising from the Missouri conviction. *See* Defendant Felix' Plea of Double Jeopardy and Motion To Dismiss The Indictment, TR. Vol I, Tab 2. The trial judge in the Eastern District of Oklahoma denied Felix' motion by Order, dated March 20, 1989, holding:

> The § 846 offense in this indictment is for *Conspiracy* to Manufacture, in the Eastern District of Oklahoma. . . . None of the other substantive counts charge *Attempting* To Manufacture, and they are all alleged to have occurred in the Eastern District of Oklahoma. The court finds the offenses herein are separate and distinct from defendant's conviction in Missouri, and his double jeopardy argument is without merit.

TR. Vol. I, Tab 24, at 9 (emphasis in original).

II

On appeal, Felix raises only one issue—that he was subjected to double jeopardy in violation of the Fifth Amendment, specifically the guarantee against being twice put on trial for the same offense. He premises this claim of error on the denial of his motion to dismiss based on double jeopardy grounds. For reasons given below, we are convinced that the Double Jeopardy Clause as interpreted recently in *Grady v. Corbin*, —— U.S. ——, 110 S.Ct. [2084] (1990), requires the reversal of most of Felix' convictions. The trial judge did not have the benefit of that recent opinion.

The Double Jeopardy Clause affords three guarantees: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). Moreover, "it has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition." *Brown v. Ohio*, 432 U.S. 161, 164 (1977). It is the second protection that Felix relies upon, namely, that he not be forced to undergo successive prosecutions for the same conduct.

General double jeopardy analysis earlier focused on the so-called traditional "*Blockburger* test" which states that:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304 (1932). The focus of that test is on the elements of the crimes, and "[i]f each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Ianelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (citation omitted).

Recently, two significant opinions from the Supreme Court have shaped the double jeopardy analysis—first, *Dowling v. United States*, —— U.S. ——, 110 S.Ct. 668 (1990), decided January 10, and second, the *Grady* case decided on May 29, 1990. *Grady* in particular makes clear that the Double Jeopardy Clause protections extend beyond the limitations expressed in the much earlier *Blockburger* test.

In *Dowling*, the defendant had been convicted of bank robbery in part on the basis of testimony of Mrs. Henry. Although she was not involved in the bank incident itself, her testimony supported the government's modus operandi evidence and established a link between Dowling and an alleged accomplice at the bank. There the bank robber had worn a mask and carried a small pistol. Mrs. Henry testified that during a burglary attempt at her home two weeks earlier, she had unmasked a man that she said was Dowling. The man she struggled with was similarly, although not identically, masked and armed as the bank robber. In a previous trial for burglary where Mrs. Henry testified as an eyewitness, Dowling had been acquitted.

The Court rejected a claim that the Double Jeopardy Clause and the Due Process Clause barred the use of Mrs. Henry's testimony at the bank robbery trial in light of the earlier acquittal. Writing for the majority, Justice White made clear that "The issue is the inadmissibility of Henry's testimony." The majority rejected Dowling's reliance on the double jeopardy principles established in *Ashe v. Swenson*, 397 U.S. 436 (1970), because in the *Dowling* case, the prior acquittal "did not determine an ultimate issue in the present case."

Dowling's holding rests on two basic reasons. First, there was a lower standard of proof applicable to the use of Ms. Henry's modus operandi evidence than in the first trial involving Dowling. A jury might reasonably conclude that Dowling was the masked man

who entered Mrs. Henry's home and gave Rule 404(b) application to the evidence, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged in the first trial. Second, the Court deemed the evidence admissible because Dowling had not demonstrated that his acquittal in his first trial represented a jury determination that he was one of the men who entered Mrs. Henry's home sufficient to justify application of *Ashe's* collateral estoppel protection. 110 S.Ct. at 674. Dowling had actually not disputed his identity and instead argued that he was merely in Mrs. Henry's home to retrieve money from an individual in the house. Thus, there was not the sharp determination of an issue in favor of Dowling as there was in *Ashe*.

Grady v. Corbin is a Double Jeopardy Clause application of much broader scope. In *Grady*, defendant Corbin, who had been drinking, drove his car across the center line and struck two oncoming vehicles, killing one person and injuring another. Although the assistant district attorney had responded to the accident and started an investigation, nevertheless, Corbin was issued two uniform traffic tickets for misdemeanor driving while intoxicated ("DWI") and failing to keep right of the median. Despite the investigation, Corbin's trial on the traffic tickets proceeded unimpeded. When the traffic court case was called, the prosecuting attorney was unaware that a death was involved and failed to object to the imposition of a minimal sentence after Corbin pled guilty.

Two months later, a grand jury indicted Corbin for reckless manslaughter, vehicular manslaughter, criminally negligent homicide, third degree assault, and DWI. In the bill of particulars, the three acts pled to establish the homicide and assault charges were

(1) intoxicated driving, (2) failing to keep right of the median, and (3) driving too fast for weather and road conditions. Corbin's motion to dismiss the indictment on double jeopardy grounds was rejected, and he sought a writ of prohibition to bar prosecution on all counts. The Appellate Division denied the writ, but the New York Court of Appeals reversed. The DWI count was found barred by the state constitution, and the manslaughter counts were found to violate *Blockburger*, as DWI was deemed a lesser included offense under state law. The remaining homicide and assault counts were barred on Fifth Amendment grounds, and were the sole subject of the Supreme Court's review.

The Court barred Corbin's prosecution, using a two-step, double jeopardy analysis. The first step is the traditional analysis:

> To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional *Blockburger* test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred.

Grady at 2090 (citing *Brown*). The Court noted, however, that the "*Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." 110 S.Ct. at 2092 (quoting *Brown v. Ohio*, 432 U.S. 161, 166-167 n.6 (1977)). The *Grady* opinion clearly defined a second step to the double jeopardy analysis:

> Thus, a subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in [*Illinois v. Vitale*], the Double Jeop-

> ardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the state will prove, not the evidence the state will use to prove that conduct. As we have held, the presence of specific evidence in one trial does not forever prevent the governmnt from introducing that same evidence in a subsequent proceeding. *See Dowling v. United States*, 493 U.S. ——, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)."

110 S.Ct. at 2093.[3]

As yet, few appellate courts have construed *Grady*,[4] but its intended breadth is obvious from its language.

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[3] Like *Grady*, this circuit has also relied on the reasoning in *Vitale* to expand double jeopardy analysis beyond the four corners of *Blockburger*'s facts. *See United States v. Genser*, 710 F.2d 1426, 1428-31 (10th Cir. 1983) (reversing the defendant's conviction on double jeopardy grounds because the successively prosecuted charges of "distribution" and "dispensation" both required proof of "knowing or intentional delivery of a controlled substance"). *Genser* itself calls for the reversal of convictions as outline below.

[4] *See, e.g., United States v. Pungitore*, 810 F.2d 1084 (3d Cir. 1990) (limiting *Grady* to "single act" crimes); *United States v. Esposito*, 912 F.2d 60 (3d Cir. 1990) (same); *United States v. Russo*, 906 F.2d 77 (2nd Cir. 1990) (per curiam) (reversing the defendant's conviction of obstructing justice under *Grady* where the conviction followed a previous acquittal for RICO conspiracy using the identical obstruction charge as a predicate offense).

The Third Circuit has said that "the language employed by the [*Grady*] Court in its formulation of the 'same conduct' test could be interpreted as extending double jeopardy protection to all situations where the government intends again to prove conduct constituting an offense subject to an earlier conviction." *United States v. Pungitore*, 910 F.2d 1084, 1110 (3d Cir. 1990). The Third Circuit, however, declined to adopt that stance believing that '[t]he double jeopardy analysis in *Brown* and *Grady*, . . ., cannot easily be transposed to the RICO context[.]" *Id.* We note, however, that the Third Circuit's analysis stems from an approach to double jeopardy issues that this circuit has already rejected, and is thus inapposite.[5]

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[5] The Third Circuit's approach bifurcates those cases which involve multiple criminal acts falling within a single statutory scheme (*i.e.*, CCE or RICO) from what may be deemed "single act" cases. *See, e.g., Pungitore* at 1110-11. Under this approach, *Garrett v. United States*, 471 U.S. 773 (1985) (holding that conviction of both CCE and the underlying predicate offense does not violate double jeopardy) controls the former, and *Grady* controls only the latter. This Court, however, has already rejected adoption of different rules based on the ability to distinguish a series of events from a single event in the double jeopardy context. *See e.g., United States v. Savaiano*, 843 F.2d 1280, 1292-93 (10th Cir. 1988) (refusing to adopt the Ninth Circuit's "single act" rule on consecutive sentences because of the "difficulty in ascertaining what is and what is not a single course of conduct"). Moreover, the Third Circuit's view is predicated on statutory delineation of separable acts. We are mindful, however, of the Supreme Court's statement in *Brown v. Ohio*, that: "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown*, 432 U.S. at 161. Thus, consistency with

We are in accord with the more recent application of *Grady* in *United States v. Calderone and Catalano*, Nos. 90-1122, 90-1123 (2nd Cir. Oct. 24, 1990). There the Second Circuit reversed the district court's denial of defendants' motion to dismiss the indictment on double jeopardy grounds, one judge dissenting. At their first trial, Calderone and Catalano had been granted a directed verdict based on the insufficiency of the evidence against them in an international, multi-drug smuggling conspiracy trial. Immediately after the directed verdict, the government filed a new indictment against them. The second indictment charged a narrower conspiracy to distribute heroin in New York City, along with 24 counts of telephone use to facilitate the crimes, and 3 counts of distribution. This "smaller" conspiracy overlapped the earlier one as to time and some overt acts.

The *Calderone* court held that "the 'same conduct' test announced in *Grady* bars prosecution of all counts of the . . . indictment." Slip op. at 7072. The court, as we do, found the scope of *Grady* to be of some breadth: "the 'same conduct' test announced in *Grady* applies to all double jeopardy claims arising in the context of successive prosecutions." Slip op. at 7075. More importantly, *Calderone* rejected the same argument advanced by the government here, namely, that the evidence presented at both trials was not used

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Savaiano, at a minimum, justifies our departure from the Third Circuit's approach.

Conversely, even within the Third Circuit's framework, *Grady* still controls here. A federal drug conspiracy charge does not require proof of overt acts. Thus, this type of conspiracy is inherently the "single act" sort of crime which the Third Circuit finds controlled by *Grady*. *See Pungitore*, 910 F.2d at 1110-11.

to prove the same conduct because the conduct proven was a district conspiratorial agreement. *See* Appellee's brief at 16-17. As explained in *Calderone*:

> [T]he "agreement" in nearly all conspiracy prosecutions is not proved directly, such as by the testimony of conspirators that "we agree to sell narcotics." Rather, the "agreement" is simply alleged, and to prove its existence the government presents evidence of the conspirator's conduct—what they said and did—and asks the jury to infer from this conduct that the criminal agreement has been established. The conduct in most conspiracy cases . . . is the focus of the case. Under *Grady*, this conduct may not be prosecuted a second time in order to establish an "agreement" that differs from the first crime only in that the indictment happens to describe it differently.

Slip op. at 7075-76. The government, then, cannot avoid the strictures of the Double Clause merely by indicting and convicting Felix on statutorily distinct charges.

As shown below, the fact that Felix' two trials constitute successive prosecutions arising from virtually the same conduct involving the same actors and overlapping time frames signals the need to apply the *Grady* double jeopardy analysis. A court should carefully apply double jeopardy analysis where a defendant's constitutional rights are threatened by prosecutors who have the opportunity to draft indictments in which they can allege *apparently* separate criminal conduct. *See Calderone*, slip op. 90-1122, 1123 at 7076, 7077 (Newman, J., concurring).

Considering, as we must, the proper application of both *Grady* and *Dowling*, we are persuaded that

Grady lays down the principle which applies with special force here. *Dowling* and *Grady* are not contradictory and we can, and must, give full application to both holdings. *Dowling* concerned, as noted, the admissibility of evidence in conformity with the collateral estoppel principle of *Ashe*[6]; *Grady* concerned the protection afforded by the Double Jeopardy Clause from successive prosecutions for the same conduct which is violative of criminal statutes. It is this latter protection under the Clause which is implicated here and this causes us to focus mainly on the teaching of *Grady*. We now turn to the facts of the instant case which we will consider under these principles.

III

Consideration of the record of the Oklahoma trial and the evidence summarized by the Eighth Circuit in the Missouri trial shows significant duplication of the conduct proved to establish the Missouri offense and most of the Oklahoma convictions. Evidence as to such conduct comes from the testimony of the following witnesses, presented at both trials: Paul Roach (Government Witness); George Dwinnells (DEA Confidential Informant); John Coonce (DEA agent); and Carolyn Ruybal (DEA chemist). *See generally Felix*, 867 F.2d at 1070-71; TR Vol. V, 317-76, 475-82; TR Vol. VI, 792-93; TR Vol. VIII, 898, 912.

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[6] The only link between the two crimes in *Dowling* was the fact that the defendant had allegedly been identified at the time of both of the crimes as similarly garbed. There was no same act or conduct at issue in the two prosecutions for which Dowling could be criminally convicted. Rather, Dowling was charged with separate crimes, arising out of separate conduct.

The Eighth Circuit described the conduct found sufficient to convict Felix of the attempt to manufacture methamphetamine, in part, as follows:

> With regard to the first element [criminal intent], evidence was presented that Felix actively learned to cook methamphetamine, toward that end supplied his instructor with methamphetamine-making chemicals and equipment, and eventually made methamphetamine at a lab near Beggs, Oklahoma. . . . Evidence further showed that Felix subsequently ordered enough chemicals and equipment to make several kilos of methamphetamine and that, upon receipt of the items, he planned to produce the drug at a lab of his own. Concerning the second element of attempt [a substantial step toward commission of the substantive attempt offense], . . . the Government's evidence show that, after learning how to make methamphetamine, Felix ordered the necessary chemicals and equipment, had a trailer full of the chemicals and equipment delivered to him, and paid $7,500 for the delivered goods. . . .

Felix, 867 F.2d at 1071 (citation omitted).

In the subsequent prosecution in Oklahoma, a number of the counts in the indictment were based on proof of the same conduct. As to Count 1, the conspiracy charge, the duplication was extensive, contrary to *Grady*. In both trials it was proven that Felix met with Roach and agreed to furnish him chemicals and equipment so that under Roach's tutelage, methamphetamine could be produced. See *Felix*, 867 F.2d at 1070; and here, TR. Vol V, 317, 337-39, 341, 357, 373-76. Furthermore, it was proven

at both trials that Felix met Dwinnels in a Tulsa bar, informed him of the Beggs lab bust, and gave him a $7,500 down payment with an order for chemicals and equipment to manufacture methamphetamine. Felix later called to increase his order, and instructed Dwinnells to deliver the chemicals and equipment to him in Joplin, Missouri. Felix then met Dwinnells in Joplin and took possession of the goods. *See Felix*, 867 F.2d at 1070-71 and n.4; and here, TR. Vol. V, 475-82; TR. Vol. VI, 792-93. This conduct was alleged in Overt Acts 17 and 18 of the Oklahoma conspiracy charge, Count 1, and was used to show that Felix had conspired to manufacture methamphetamine in the Oklahoma case.[7] Previously

[7] We are mindful that 21 U.S.C. § 846 does not require proof of an overt act in the prosecution of a drug conspiracy. That does not mean, however, that we should disregard the conduct represented by the overt acts pled in the instant Oklahoma indictment. The proof of such conduct as is alleged in the overt acts in the Oklahoma case tended to show the criminal agreement for the conspiracy charged in Oklahoma, and thus was a significant part of the proof in the Eastern District of Oklahoma. Some of the acts occurred elsewhere, but that was contemplated by the Oklahoma indictment which alleged in Court 1 a conspiracy in the Eastern District of Oklahoma "and elsewhere" from on or about May 1, 1987, continuously to on or about August 1, 1987.

The conduct alleged as the overt acts was before the Oklahoma trial jury as the very "actions in furtherance of that conspiracy," *see* TR. Vol. VII, 1001. Furthermore the government's closing argument expressly emphasized the relevance of the conduct described in overt acts 17 and 18 to the jury's determination of guilt. *See id.* at 1002, 1018. And DEA chemist Ruybal, who testified in both trials, conceded that the physical evidence admitted here included "the identical exhibits introduced at [the Missouri] proceeding[.]" *Id.* at 912. The indictment was read to the jury at the beginning of trial and furnished to the jury with the instructions. VII

in Missouri, however, the identical conduct established both the intent and "substantial step" elements of the attempt to manufacture methamphetamine charge.

In fact, the government's response below to Felix' motion to dismiss on double jeopardy ground makes clear the violation of the *Grady* principles:

> The possession of chemicals and equipment necessary to the manufacture of methamphetamine, overt acts 17 and 18 in the present indictment, *was the activity leading to defendant's conviction for attempted manufacture in the Western District of Missouri.*

Government Response below, p. 2 (emphasis added).

In addition to the overlap in the conduct giving rise to the successive prosecutions, the two offenses did not involve distinct persons, places, or times. Both prosecutions focused on Felix and Roach as the actors. Both prosecutions presented evidence of acts occurring outside the borders of the respective states in which the trials took place. The instant indictment alleged that the conspiracy took place in the "Eastern District of Oklahoma *and elsewhere.*" *United States v. Felix*, Indictment No. 89-16-CR

R. 1070. Thus, Felix' conduct as to the purchase of chemicals and equipment in the Tulsa bar and the delivery of the same in Joplin, Missouri, was proven and argued in the successive trials as a basis for the successive convictions.

This circumstance is similar to that discussed by Judge Newman in his concurring opinion in *United States v. Calderone and Catalano*, 917 F.2d at ——. In *Calderone*, Judge Newman said that the government was contending that the defendant "committed these [overt] acts in furtherance of the Adamita conspiracy and that these acts showed their participation in that conspiracy."

(emphasis added). Similarly, the indictment alleged that one of the means of the conspiracy was to manufacture drugs for distribution in the "Eastern District of Oklahoma *and elsewhere*." *Id.* (emphasis added). Overt act No. 18 alleged that on August 31, 1987, Felix, "while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." Finally, the relevant time frames of the two indictments also overlap. The Missouri prosecution was premised on conduct that occurred from the spring of 1987 to August 31, 1987. *Felix*, 867 F.2d at 1070. The Oklahoma prosecution was premised on conduct that occurred from "about" May 1, 1987 to August 31, 1987 (Count 1); and on July 13, 1987 (Counts 2, 3, 4, and 5).

Accordingly, under the clear principle pronounced in *Grady* against successive prosecutions for the same conduct, we hold that the successive prosecution of Felix in Oklahoma for the same conduct for which he was previously convicted in Missouri violated the Double Jeopardy Clause. Thus the Count 1 conspiracy conviction of Felix in the instant case cannot stand.

As to the substantive offenses charged in Counts 2 through 5, in both trials it was proven that Roach and Felix bought chemicals and equipment from Dwinnells at Tulsa Scientific for the purpose of manufacturing and distributing methamphetamine. *See Felix*, 867 F.2d at 1070-71; and here, TR. Vol. V, 346-48, 356. They used these chemicals and equipment to create precursor chemicals (*e.g.*, methamphetamine oil and phenyllacetone), which in turn were subsequently used to generate methamphetamine at the Beggs, Oklahoma lab. *Felix*, 867 F.2d at 1070-71; and here, TR. Vol. V, 346-48, 354-56, 360-

62, 367-68, 370-71. This conduct served to establish the intent element of the attempt to manufacture methamphetamine in the Missouri trial; it also served as factual support for Felix' convictions in Oklahoma of possessing precursor chemicals (Counts 4 and 5), and manufacturing and possessing with intent to distribute methamphetamine (Counts 2 and 3). Hence Felix' conviction on these Counts must also be reversed.

Likewise Count 6 of the Oklahoma indictment clearly was a successive prosecution for conduct that was the subject of the Missouri prosecution. Count 6 here charged that from on or about June 1, 1987, in the Eastern District of Oklahoma, Felix and co-defendant Pinter maintained and/or made available a place and enclosure for manufacturing methamphetamine/amphetamine. Proof during the Oklahoma trial included Roach's testimony that he knew Felix in about May 1987, V R. 316; that in Texas Felix discussed finding a place to set up "the lab," id. at 337; Felix said he wanted Roach to take some of the glassware to Okmulgee, Oklahoma; Roach met a man named B. J. (codefendant Pinter) there and they went to a location near Beggs, Oklahoma (which is in Okmulgee, County), id. at 344; Felix showed up and they discussed the glassware, id. at 346-47; Felix and Roach went to Tulsa and bought glassware, id. at 347-48; after Father's Day, Felix and Roach had conversations at the lab site and Felix and Roach "just kind of worked together on [throwing away trash at the lab site]." Id. at 368. Dennis [Felix] paid Roach $4,000 cash for Roach's part of the lab work; they did 4, 5 or may 6 cooks. Id. at 370.

This proof offered to support Count 6 of the Oklahoma indictment was close to that outlined in the Eighth Circuit *Felix* opinion on Roach's testimony

that Felix furnished Roach methamphetamine-making chemicals during the Spring of 1987; that he and Felix bought chemicals and equipment in Tulsa and eventually cooked methamphetamine in a trailer near Beggs; and that on July 13, 1987, officers seized the trailer near Beggs. *Felix*, 867 F.2d at 1070. The evidence of this conduct was identified by the Eighth Circuit as presented in connection with the essential elements of the attempt to manufacture methamphetamine prosecution in the Missouri federal case: (1) an intent to engage in the criminal conduct; and (2) conduct constituting a "substantial step" toward the substantive offense, strongly corroborating the actor's criminal intent. *Felix*, 867 F.2d at 1071. The subsequent Oklahoma trial on such evidence of knowingly maintaining a place for manufacturing the controlled substance (see allegations of Count 6, note 1, *supra*) thus subjected Felix to a successive trial for the same conduct, contrary to *Grady*. Thus the Count 6 conviction also cannot stand.

We conclude, however, that the defendant Felix has not shown grounds for disturbing his convictions and sentences on Counts 9 and 10. The defendant bears the burden of proving a double jeopardy claim. *United States v. Cardall*, 885 F.2d 656, 665 (10th Cir. 1989). Count 9 charged interstate travel on or about June 21, 1987 from Texas to the Eastern District of Oklahoma and elsewhere with intent to promote, etc., the management, etc., of manufacture of methamphetamine/amphetamine. Count 10 made similar allegations of interstate travel on or about July 13, 1987, from Texas to the Eastern District of Oklahoma and elsewhere with the intent to promote, etc., the same unlawful conduct. The closest that the conduct outlined in the Eighth Circuit *Felix* opinion

gets to the conduct charged in the instant Counts 9 and 10 is presented by an allegation that on July 13, 1987, law enforcement officers seized the trailer near Beggs, Oklahoma; that Felix instructed Dwinnells to deliver chemicals and equipment to the Joplin, Missouri Holiday Inn; that Felix and Dwinnells met at that motel where Felix had rented a room; and that a controlled delivery was arranged to be made in Joplin on August 31, 1987. 867 F.2d at 1070-71.

We cannot agree that the double jeopardy claim was established as to the Count 9 and 10 convictions and sentences, which was a burden the defendant Felix had to carry.[8]

In sum, we conclude that the Double Jeopardy Clause of the Fifth Amendment barred defendant Felix' successive prosecution on Counts 1, 2, 3, 4, 5, and 6, of the Oklahoma indictment and his convictions, sentences, and special $50 assessments on those Counts are REVERSED. His convictions on Counts 9 and 10 need not be disturbed and are AFFIRMED; however, the case is remanded for re-sentencing on said Counts 9 and 10.

IT IS SO ORDERED.

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[8] At first glance, the remaining counts: 9 and 10 (interstate travel to promote manufacturing) seem akin to the telephone counts also barred in *Calderone*. Arguably, they also "allege[] as an element the facilitation of the conspiracy charged in count one." Slip op. at 7086 (Newman, J., concurring). We are not, however, inclined to go so far on the record before this Court.

ANDERSON, Circuit Judge, dissenting:

I respectfully dissent.

Frank Dennis Felix was convicted in the United States District Court for the Western District of Missouri of attempting to manufacture methamphetamine. *See United States v. Felix*, 867 F.2d 1068, 1070 (8th Cir. 1989) (affirming the conviction). But nothing in the Double Jeopardy Clause, or the Supreme Court jurisprudence interpreting that provision, barred Felix's subsequent prosecution in the United States District Court for the Eastern District of Oklahoma for geographically and temporally separate acts that violated federal drug laws. In hold that the Double Jeopardy Clause requires reversal of six of Felix's drug convictions, the majority overlooks the plain language of the Supreme Court's recent holding in *Grady v. Corbin*, 110 S.Ct. 2084 (1990), and adopts a dangerously broad interpretation of the Double Jeopardy Clause.

I. The *Grady* Rule

The majority relies upon the Supreme Court's recent decision in *Grady v. Corbin*, 110 S.Ct. 2084 (1990). This reliance is misplaced. The majority opinion mischaracterizes *Grady*'s rule. The majority refers to a bar against: "significant duplication of conduct proved," Proposed Majority Opinion at 13, "counts in the indictment . . . based on proof of the same conduct," *id.* at 14, and "successive trial[s] for the same conduct." *Id.* at 18. The majority similarly cites "the clear principle pronounced in *Grady* against successive prosecutions for the same conduct." *Id.* at 16.

The *Grady* Court, however, did not establish a "same conduct" rule.[1] By its plain language, *Grady* only bars subsequent prosecutions

> in which the government, *to establish an essential element* of an offense charged in that prosecution, will prove *conduct that constitutes an offense for which the defendant has already been prosecuted.*

Grady v. Corbin, 110 S.Ct. at 2093 (emphasis added). This language comprises several crucial elements, none of which the majority discusses or applies because it lumps them together into a "same conduct" test. The majority further confuses the matter by switching, with no explanation, to a comparison of the evidence presented at each trial, an approach explicitly rejected by *Grady*. 110 S.Ct. at 2093.

Under *Grady*'s plain language, the proper approach begins by identifying the conduct sought to be proved in the instant prosecution, as set forth in the indictment. Once that is ascertained, two important

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[1] The majority begins its double jeopardy analysis on the wrong foot when it equates the term "same offense" found in *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), with "same conduct." Proposed Majority Opinion at 5. Although both the Second Circuit, *United States v. Calderone*, 917 F.2d 717 (1990), and the Third Circuit, *United States v. Pungitore*, 910 F.2d 1084 (1990), also style the *Grady* rule as the "same conduct" test, they do not apply the majority's simplified analysis to the facts of those cases. As the majority opinion evidences, this characterization risks misapplication of the rule because it suggests that the Double Jeopardy Clause analysis entails a simple comparison between any conduct that the government seeks to prove in two prosecutions.

questions must be answered: (1) is this conduct that constitutes an offense for which the defendant has already been prosecuted? and (2) is it being proven to establish an essential element of the offense for which the defendant is being prosecuted? The *Grady* rule bars the instant prosecution *only* if the answer to *both* questions is affirmative. There are important sub-parts to each of the two questions. Under the first question, for example, the conduct may not "constitute an offense." Or, even if it does constitute an offense, it may not have been an offense "for which the defendant had already been prosecuted." Under the second question, it may be that the conduct does not "establish" an essential element, or it may establish an element that is not "essential."

It is not for this court to re-write *Grady*'s rule. We must give meaning to *each* of its elements. When that is done, the rule does not bar Felix's prosecution in Oklahoma.

II. Counts 2 though 6

The majority reverses Felix's convictions on Counts 2 though 6. The stated rationale is that much of Felix's conduct serving as the basis for these Oklahoma convictions has been introduced into evidence at Felix's trial in Missouri.

But the *Grady* rule does not bar subsequent proof of *all* conduct introduced into evidence in a previous trial. *Grady* only bars the prosecution in a subsequent trial from proving "conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 110 S.Ct. at 2093. As the rule suggests, the conduct alleged in the subsequent prosecution in *Grady* constituted separately

cognizable offenses for which Corbin had already been prosecuted.[2]

In contrast, Felix had never been prosecuted for the conduct alleged in Counts 2 through 6 of the Oklahoma prosecution. Each of those counts was based on Felix's conduct on or before July 13, 1987, in establishing and operating the methamphetamine lab in Beggs, Oklahoma. R. Vol. I at Tab 1. In the Missouri trial, however, Felix had only been prosecuted for his conduct "[f]rom on or about August 26, 1987, to on or about August 31, 1987," over a month *after* the July 13 DEA seizure of the Beggs lab. Missouri Indictment, R. Supp. Vol. II at 1.

Evidence regarding Felix's involvement with the Beggs lab was admitted in the Missouri trial under Rule 404(b) of the Federal Rules of Evidence[3] as "highly probative of Felix's knowledge and intent." *United States v. Felix*, 867 F.2d 1068, 1072-73 (8th Cir. 1989). In its instructions to the jury, the District Court in Missouri emphasized that Felix was not being prosecuted for the earlier Oklahoma acts:

> You have heard evidence that the defendant *previously* committed a crime *similar* to the one charged in this case. You may not use this *evidence* to decide whether the defendant carried out the *physical acts involved in the crime charged here.* However, if you are convinced be-

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[2] Those separately cognizable offenses were 1) driving while intoxicated, and 2) failing to keep right of the median. *Grady v. Corbin*, 110 S.Ct. at 2088, 2094.

[3] Fed. R. Evid. 404(b) provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts is . . . admissible . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident."

> yond a reasonable doubt, by other evidence, that the defendant did carry out the physical acts involved in the crime charged here, then you may consider this *evidence only* on the question of motice, opportunity, preparation, plan, knowledge, identity or absence of mistake.

United States v. Felix, 867 F.2d at 1074-75 (citing Fed. R. Evid. 404(b)) (emphasis added).

It is clear that Felix was not prosecuted in the Missouri case for the conduct that the government proved with respect to Counts 2 through 6 of the Oklahoma prosecution. Introducing 404(b) evidence of a prior bad act is not prosecution for that act. *United States v. Van Cleave*, 599 F.2d 954, 957 (10th Cir. 1979) (evidence of conduct for which the defendant had already been prosecuted "was not introduced for the purpose of retrying [him;] it was introduced to prove motive and intent in connection with . . . the charge for which he was then on trial"). As the Supreme Court explained in *Grady*,

> The critical inquiry is what *conduct* the State will prove, not the *evidence* the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing the same evidence in a subsequent proceeding. *See Dowling v. United States*, 493 U.S. — (1990).

Grady v. Corbin, 110 S.Ct. at 2093.

In holding that *Grady* mandates the reversal of Counts 2 through 6, the majority goes far beyond what the Supreme Court intended. First, the majority seems to require what the Supreme Court explicitly rejected: "that all charges against a defendant growing out of a single criminal transaction be tried in one proceeding." *Grady v. Corbin*, 110 S.Ct. at 2094, n.15 (quoting *Jones v. Thomas*, 491 U.S. 376 (1989) (Brennan, J., dissenting), *reh'g denied*, 110 S.Ct. 12 (1989)). Even this "same transaction" test, however, would not bar Felix's Oklahoma prosecution for Counts 2 through 6. His involvement in manufacturing methamphetamine at the lab in Beggs, Oklahoma, was temporally and geographically separate from his subsequent attempt to manufacture methamphetamine in Missouri, which occurred over a month after the Beggs lab was raided. In no sense were these events "a single criminal transaction." *Id.*[4]

Second, the majority's interpretation of *Grady* effectively eviscerates Fed. R. Evid. 404(b). The majority equates the introduction of 404(b) prior bad act evidence with prosecution for the bad acts. If that were the case, prosecutors could *never* introduce 404(b) evidence in situations where the defendant had already been prosecuted for the bad act without violating the Double Jeopardy Clause. Moreover, if Rule 404(b) evidence were allowed (because the conduct had not been prosecuted), it could never be introduced again without violating the Double Jeop-

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[4] The majority obfuscates the delineation between Felix's involvement in the Beggs laboratory and his subsequent attempt to set up another laboratory by describing the facts as a "course of conduct and events." Proposed Majority Opinion at 3. One could characterize a lifetime criminal's entire career in this fashion, but it would not mean the government, under the Double Jeopardy Clause, could only prosecute him once.

ardy Clause. It is inconceivable that the *Grady* Court, without any such indication, would limit so drastically the application of Rule 404(b).

Actually, the Supreme Court implicitly rejected such an incongruous interpretation of Rule 404(b) in *Dowling v. United States*, 110 S.Ct. 668 (1990).[5] At Dowling's trial for robbing a bank while wearing a ski mask and carrying a small pistol, a witness testified that a similarly masked and armed man broke into her home about two weeks after the bank robbery, that a struggle ensued, and that she unmasked the intruder, whom she identified as Dowling. The government offered this 404(b) evidence in order to strengthen its identification of Dowling as the bank robber. *Dowling v. United States*, 110 S.Ct. at 670. The residential burglary was an offense for which Dowling had already been prosecuted and acquitted. But the Supreme Court held that introducing the 404(b) testimony did not violate the Double Jeopardy Clause. *Id.* at 672-73.[6]

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[5] While the dissenters in *Grady* express their opinion that the decision is inconsistent with *Dowling*, *see* 110 S.Ct. at 2095-96 (O'Connor, J., dissenting); *id.* at 2102 (Scalia, J., with whom Rehnquist, C.J., and Kennedy, J., join, dissenting), the *Grady* majority gives no such indication. In fact, the opinion cites to *Dowling* for the proposition that "the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." *Grady v. Corbin*, 110 S.Ct. at 2093. Given this citation, and, "in the face of the challenge raised in the dissents, [*Grady*] should be read, if at all possible, not to overrule *Dowling*." *United States v. Calderone*, 917 F.2d 717, 724 (2d Cir. 1990) (Newman, J., concurring).

[6] The majority attempts to distinguish *Dowling* by suggesting that it only involved a question regarding the admissibility of evidence. The evidentiary question, however, was whether admission under Rule 404(b) of Dowling's prior bad act, for which he had already been tried and acquitted, violated the Double Jeopardy Clause.

In holding that it did not, the Court pointed to one of the many differences between introducing 404(b) evidence of a bad act and prosecution for that act: Rule 404(b) evidence is governed by a lesser standard of proof. *Dowling v. United States*, 110 S.Ct. at 672-73. The standard for Rule 404(b), recently reaffirmed in *Huddleston v. United States*, 485 U.S. 681, 689 (1988), is whether "the jury can reasonably conclude that the act occurred and that the defendant was an actor." This is obviously far less exacting than the "beyond a reasonable doubt" standard applicable to the actual offense.

In short, nothing in Supreme Court's Double Jeopardy jurisprudence supports the reversal of Felix's convictions on Counts 2 through 6.

III. Count 1: Conspiracy

The majority further demonstrates a disregard for the plain language of *Grady*'s rule in reversing Felix's conviction on the conspiracy count. The stated rationale is that the conspiracy count was premised on conduct for which Felix had been previously prosecuted in Missouri. Proposed Majority Opinion at 16. But this is neither a correct statement nor a correct application of *Grady*'s rule. It bears repeating that *Grady*'s rule only bars situations in which the prosecution,

> to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant had already been prosecuted.

Grady v. Corbin, 110 S.Ct. at 2093. In reversing the conspiracy count, the majority does not once cite to or apply this actual language. As a result, the majority overlooks both of its crucial elements.

A.

As with Counts 2 through 6, the conduct in question here does not "constitute an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 110 S.Ct. at 2093.

Here, too, the majority mistakenly focuses on the overlap of evidence presented at each trial. *See* Proposed Majority Opinion at 13-15. This approach blurs the distinction described in *Grady* between previously prosecuted conduct and evidence used to prove that conduct. The majority opinion, for example, states "The Missouri prosecution was premised on conduct that occurred from the spring of 1987 to August 31, 1987." Proposed Majority Opinion at 16. To support this statement, it cites to the Eighth Circuit's review of the Missouri conviction. The cited text, however, is the Eighth Circuit's discussion of the *evidence* admitted at trial (including the Rule 404(b) evidence discussed above in Section II). *See United States v. Felix*, 867 F.2d at 1070. As demonstrated above, the indictment reveals that Felix was only prosecuted for conduct committed "[f]rom on or about August 26, 1987, to on or about August 31, 1987 . . . ." R. Supp. Vol. II at 1. Felix had not already been prosecuted for his conduct prior to August 26.

The more difficult question is raised by the two overt acts alleged in Count 1 that did occur between August 26 and 31, 1987. Two of the eighteen overt acts alleged in this conspiracy count were:

> 17. On August 26, 1987, FRANK DENNIS FELIX, while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine.
>
> 18. On August 31, 1987, FRANK DENNIS FELIX, while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine.

R. Vol. I, Tab 1 at 3-5.

Whether these acts constitute the offense for which Felix had been prosecuted in Missouri depends on how far one is willing to expand the meaning of the word "offense." Felix was prosecuted for attempt to manufacture methamphetamine. R. Supp. Vol. II at 1. The attempt offense consists of two elements:

> (1) an intent to engage in criminal conduct, and (2) conduct constituting a "substantial step" towards the commission of the substantive offense which strongly corroborates the actor's criminal intent.

United States v. Felix, 867 F.2d at 1071 (quoting *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982)). Overt acts 17 and 18 of the Oklahoma indictment do not constitute the attempt offense. At most, the two acts constitute the second element of the attempt offense: the "substantial step" towards commission of the substantive crime.

The Second Circuit has interpreted the word "offense" broadly. It has held that *Grady* bars the subsequent prosecution from proving "conduct constituting the entirety of a previously prosecuted offense, or the entirety of an element of a distinct component of such an offense." *United States v. Calderone*, 917 F.2d 717, 725 (2d Cir. 1990) (Newman, J., concurring). However, in the absence of any indication

from the Supreme Court that it intended such a liberal interpretation of the word "offense," I would not adopt such an expansive holding. Applying *Grady*'s plain language, the two overt acts do not constitute the attempt offense for which Felix was already prosecuted in Missouri.

B.

Moreover, proof of the two overt acts at issue did not "establish an essential element" of the offense for which Felix was being prosecuted. Count 1 charged Felix and three other individuals with conspiring to manufacture, possess with intent to distribute, and distribute methamphetamine. R. Vol. I, Tab 1 at 1-2. The essential elements of conspiracy are as follows:

> The essence of the crime of conspiracy is an agreement to violate the law. The evidence . . . need only establish the *existence* of a conspiracy and that a defendant *knowingly contributed* his efforts in furtherance thereof.

United States v. Savaino, 843 F.2d 1280, 1293 (10th Cir. 1988) (citations omitted) (emphasis in original), *cert. denied*, 488 U.S. 836 (1988). "[A]n overt act is *not* a *necessary* element of conspiracy under the federal drug enforcement statutes." *Id.* at 1294 (emphasis added).

One position, then, would be that since overt acts are not an essential element of the conspiracy offense, *Grady* does not bar their introduction. But such a conclusion does not fully apply *Grady*'s plain language. It is arguable that the two overt acts, while not themselves an essential element, were introduced by the prosecution to *establish* an essential element:

the agreement to violate the drug laws. Indeed, although "[t]he essence of the crime of conspiracy is an agreement to violate the law[,] . . . [t]he nature of the offense of conspiracy with its attendant aspects of secrecy, often requires that elements of the crime be established by circumstantial evidence." *Id.* at 1293.

Careful scrutiny, however, reveals that the overt acts at issue here did not meaningfully "establish" an essential element of the conspiracy. The indictment reveals that the crux of the Oklahoma conspiracy concerned the conspirators' activities surrounding the Beggs lab. The two overt acts encompass Felix's illegal activity *after* the government seized the Beggs lab. Nothing in the evidence links any of Felix's co-conspirators to his subsequent attempt to manufacture methamphetamine in Missouri. In other words, the two overt acts do not "establish" an agreement between Felix and his co-conspirators in Oklahoma, nor do they "establish" any contribution to the Oklahoma conspiracy.[7]

The majority incorrectly relies on *United States v. Calderone* to support its reversal of the conspiracy conviction. *See* Proposed Majority Opinion at 11. Examination of the three opinions filed in that case reveals that the *Calderone* panel would not have reversed Felix's conviction on this count. Judge New-

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[7] Obviously, the contours of what conduct "establishes" an essential element will have to be determined by courts applying *Grady*'s rule. I do not dispute that some line-drawing will eventually be necessary. This, however, does not present a close case. In no sense did the two overt acts at issue "establish" the conspiracy, or any of its essential elements.

man, in his concurring opinion, explicitly rejected the interpretation of "establish" that the majority in this case adopts.

> [W]e are obliged to apply *Grady* in a way that gives the "element" component significance. That means barring the second prosecution only when the conduct previously prosecuted is to be used to "establish" the element of the second crime, which I think must mean "constitute the entirety of" the element. If *Grady* is read more broadly, that is, if the second prosecution is barred whenever the previously prosecuted conduct is to be used only *as evidence of* an element of the second offense, then we would almost be applying a "same evidence" test. [It is] more likely that the Supreme Court expected *Grady* to apply only when the conduct prosecuted at the first trial is or may constitute the entirety of an element of the offense at the second trial.

United States v. Calderone, 917 F.2d at 724 (footnote omitted) (emphasis in original).[8] Judge Newman correctly adopted this position in order not to conflict with the Supreme Court's decision in *Dowling*. *Id.* at 724.

[8] It is clear that Judge Miner, in dissent, not only agrees with this interpretation of "establish," but also holds to the literal language of the rest of the *Grady* rule. *Id.* at 726-29 (Miner, J., dissenting). Judge Pratt, who wrote the opinion of the court, does not explicitly address the "establish" element of *Grady*. He repeatedly emphasizes his concern, however, that the two prosecutions in that case—which were both for drug conspiracies—were prosecutions for the same offense disguised only by different descriptions of the requisite conspiracy agreement. *Id.* at 721 ("this conduct may not be prosecuted a second time in order to establish an 'agreement' that differs from the first crime only in that the indictment happens to describe it differently"). Here, not only are the substantive offenses different, they also contemplate different times, places, and actors.

The Second Circuit has subsequently expanded *Calderone* beyond the limitations of Judge Newman's concurrence. In *United States v. Gambino*, 920 F.2d 1108 (2d Cir. 1990), the panel abandoned any analysis of the "establish" element. *Id.* at 1112. To the extent *Gambino* declines to correctly apply this and other elements of the *Grady* rule, I find the decision incorrect.

In addition, the majority attempts to distinguish the Third Circuit's interpretation of *Grady* in *United States v. Pungitore*, 910 F.2d 1084, 1109 (3d Cir. 1990). The majority adopts the interpretation of *Grady* that the *Pungitore* court specifically rejected. This is justified, we are told, because the Third Circuit's approach is based upon a "bifurcation" of the Double Jeopardy analysis that the Tenth Circuit has already rejected. *See* Proposed Majority Opinion at 10.

In reality, the Third Circuit's treatment of *Grady* is less about "bifurcation" than it is about how far *Grady*'s rule should be extended beyond its reasoning. The *Pungitore* court's reluctance to apply *Grady* "expansively," *id.* at 1110, was based on an examination of *Grady*, its precedential roots, and another Supreme Court case. And our supposed "rejection" of *Pungitore*'s approach, *United States v. Savaiano*, 843 F.2d 1280 (10th Cir. 1988), *cert. denied*, 488 U.S. 836 (1988), is a pre-*Grady* case that confirms the permissibility, under the Double Jeopardy Clause of prosecuting a defendant for both attempt and conspiracy offenses arising from the same conduct.

The question in *Pungitore* was whether the *Grady* rule barred a successive prosecution for a compound-complex felony when the defendant had already been prosecuted for one of the predicate offenses. *United States v. Pungitore*, 910 F.2d at 1109. The Third Circuit noted that both *Grady* and the case upon which it relied for its reasoning, *Illinois v. Vitale*, 447 U.S. 410 (1980) and *Brown v. Ohio*, 432 U.S. 161 (1977), involved a "discrete criminal event." *Id.* at 1110. The court also noted that the *Brown* Court, much like the *Grady* Court, was concerned with the practice of avoiding the Double Jeopardy Clause by "the simple expedient of *dividing a single crime into a series of temporal or spatial units.*" *Id.* (quoting and adding emphasis to *Brown v. Ohio*, 432 U.S. at 169).

The Third Circuit recognized, however, that some crimes *are* "made up of 'a series of temporal or spatial units,'" *id.*, and that the Supreme Court's decision in *Garrett v. United States*, 471 U.S. 773 (1985), *reh'g denied*, 473 U.S. 927 (1985), was "more closely analagous" to the question before them. In *Garrett*, the Supreme Court held that a continuous criminal enterprise (CCE) offense and its predicate offenses are separately punishable, and that "prosecution for a CCE offense after an earlier prosecution for a predicate offense is constitutional under the Double Jeopardy Clause." *Garrett v. United States*, 471 U.S. at 786. Although decided before *Grady*, *Garrett* distinguished *Grady's* predecessor, *Brown v. Ohio*, as involving a "single course of conduct—driving a stolen car." *Id.* at 787. That single act had supported prosecutions of a defendant for both joyriding and theft. This was unacceptable because "[e]very mement of his conduct was as relevant to the joyriding charge as it was to the auto theft charge." *Id.* Conversely, the CCE offense before the *Garrett* Court "spanned 5½ years and several states," while the predicate offense indictment specified only several days within a two month period. *United States v. Pungitore*, 910 F.2d at 1111. The *Garrett* Court cautioned against "ready transportation" of the "principles of double jeopardy from the classically simple situation presented in *Brown* to the multilayered conduct, both as to time and to place, involved in this case." *Garrett v. United States*, 471 U.S. at 789.

The Third Circuit concluded that "*Grady*, which finds its roots in 'single transaction' cases such as *Brown*, is no more applicable in the instant circumstances than *Brown* was in *Garrett*." *United States v. Pungitore*, 910 F.2d at 1111. This holding was not based upon "an approach to double jeopardy issues that this circuit has already rejected," as the majority claims. Proposed Majority Opinion at 10. To the contrary, the Third Circuit's holding was based upon the Supreme Court's decision in *Garrett*. And, as the Third Circuit noted, nothing in *Grady* indicates an intention to overrule *Garrett*.[9] *United States v. Pungitore*, 910 F.2d at 1111 n.29.

The Tenth Circuit case that the majority cites—*United States v. Savaiano*, 843 F.2d 1280 (10th Cir. 1988), *cert. denied*, 448 U.S. 836 (1988)—does not reject the approach of either *Garrett* or *Pungitore*. In *Savaiano*, we held that "separate sentences may be

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[9] The Third Circuit also applied *Garrett* in *United States v. Esposito*, 912 F.2d 60, 63-65 (1990) (rejecting a Double Jeopardy challenge to prosecution for predicate acts *after* the RICO prosecution and discussing both *Garrett* and *Grady* at length).

imposed for dual convictions of conspiracy and attempt under [21 U.S.C. §] 846." *id.* at 1293, *regardless* of whether the underlying conduct could be characterized as "a single act, course of conduct, or transaction." *Id.* at 1292 (citing with disapproval *United States v. Touw*, 769 F.2d 571, 574 (9th Cir. 1985)). We refused to categorize the underlying conduct because its category was irrelevant: "Once conspiracy and attempt are identified as separate crimes, separate punishment follows, just as separate punishment may be imposed for convictions on conspiracy and the completed crime." *Id.* at 1293.[10] Thus, if it rejects anything, *Savaiano* rejects the interpretation that the majority adopts today.

The majority could learn from the Third Circuit's reluctance to extend *Grady* beyond its roots. The reasoning behind *Garrett* similarly applies to prosecutions for conspiracy. Like compound-complex felonies, conspiracy often involves "multilayered conduct, both as to time and to place."[11] *Garrett v. United States*, 471 U.S. at 789. The majority's position would prohibit any temporally separate prosecutions for attempt and conspiracy with overlapping eviden-

[10] While we further commented that the Ninth Circuit's categorization approach guaranteed additional litigation and provided little guidance to the parties or the district courts, *United States v. Savaiano*, 843 F.2d at 1293, this dicta did not constitute our *ratio decidendi*, and was limited to the narrow issue before us in *Savaiano*. At any rate, we were (and are) not in a position to "reject" the Supreme Court precedent embodied in *Garrett*.

[11] Here, Felix's Oklahoma conspiracy indictment spanned four months, while the prior Missouri attempt indictment confined itself to acts committed within a six-day period.

tiary support.[12] I do not believe that either Congress or the Supreme Court intended such a result, particularly in the area of drug offenses.

In sum, when each of its elements is applied, the *Grady* rule does not warrant reversal of Felix's conviction on Count 1. Applying *Grady*'s plain language, conduct constituting the offense for which Felix was prosecuted, i.e., conduct constituting an attempt to manufacture methamphetamine between August 26 and 31, 1987, was not proved in Felix's Oklahoma prosecution to establish an essential element of the conspiracy charge.

CONCLUSION

The majority adopts an interpretation of *Grady* so expansive that it casts a shadow over a great part of accepted criminal law and procedure. There is no indication in *Grady* that the Supreme Court intended such a result.

Examination of *Grady*'s actual holding reveals that it stands for a relatively narrow proposition: prosecutors may not, to establish an essential element of a charge, attempt to prove conduct that constitutes an offense for which the defendant has already been prosecuted. This squares with Fed. R. Evid. 404(b), *Dowling*, *Garrett*, and the rest of our jurisprudence. The majority's holding does not.

I am mindful of the abuses of successive prosecution that the Double Jeopardy Clause is intended to prevent. The State must "not be allowed to make repeated attempts to convict an individual for an al-

[12] Moreover, in rejecting *Pungitore's* analysis, the majority's interpretation of *Grady* risks stifling prosecution of all complex, continuing criminal offenses.

leged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Grady v. Corbin*, 110 S.Ct. at 2091 (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)). But the Oklahoma prosecution was in no way an attempt to convict Felix for the same offense, or even the same conduct. The "ordeal" Felix underwent was the natural result of committing a series of separate federal drug offenses during the summer of 1987.

Accordingly, I dissent. The judgment of the district court should be Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 89-16-CR

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK DENNIS FELIX, ET AL., DEFENDANTS

[Filed Mar. 20, 1989]

ORDER
DENYING ALL DEFENDANTS' MOTIONS FOR BILLS OF PARTICULAR

Three defendants have made enumerated requests for particulars in order to adequately prepare their defenses and to avoid prejudicial surprise.

The grant or denial of a bill of particulars is within the discretion of the trial court. Fed. R. Crim. P., Rule 7(f).

The purposes of a bill of particulars are to inform an accused of the nature of the charge or charges against him with specific precision to enable him to prepare for trial, to avoid and minimize the danger of surprise at the time of trial, and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague and indefinite for such

purposes, *Tritt v. United States*, 421 F.2d 928, 930 (10th Cir. 1970); *Wyatt v. United States*, 388 F.2d 395, 397 (10th Cir. 1968). A defendant is not entitled to a bill of particulars unless the information requested would define more specifically the offense or offenses charged against him, *United States v. Evans*, 542 F.2d 805, 809 (10th Cir. 1976), *cert. denied*, 429 U.S. 1011, 97 S.Ct. 1124, 51 L.Ed. 2nd 550 (1977); *United States v. Gleeson*, 422 F.2d 1091, 1094 (10th Cir. 1969). It is not the function of the bill of particulars to disclose in detail the evidence upon which the government will rely at trial, *Cefalu v. United States*, 234 F.2d 522, 524 (10th Cir. 1956).

The court finds that the indictment adequately apprises defendants of the charges against them with sufficient precision to enable them to prepare for trial and avoid surprise in the case. Accordingly, defendants' motions for bills of particulars are denied. Fed. R. Crim. P., Rule 7(f).

DENYING ALL DEFENDANTS' MOTIONS FOR SEVERANCE

Three defendants have moved the court for separate trials from other defendants. Federal Rules of Criminal Procedure 14 provides that if it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires. To support a motion for severance a defendant must carry the heavy burden of showing prejudice by the joinder, *United States v. Parnell*, 581 F.2d 1374, 1383 (10th Cir. 1978). The defendant must show clear prejudice by the joinder at trial, *United States v. Bridwell*, 583

F.2d 1135, 1142 (10th Cir. 1978); *United States v. Smaldone*, 485 F.2d 1333, 1345 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

One defendant cites *Bruton v. United States*, 391 U.S. 123 (1968), as authority for his motion for severance. In *Bruton* a codefendant had made statements incriminating Bruton and Bruton was deprived of the right to cross-examine the codefendant as to the statements because the codefendant could not be called to the stand. The United States Supreme Court held that prejudice to Bruton due to lack of the ability to cross-examine the other defendant required that Bruton be tried separately. However, in this case the defendant has failed to show the court that any codefendant made a statement incriminating another. Therefore, *Bruton* is inapplicable to this case. Further, as to the other moving defendants, prejudice requiring severance is not present merely because the evidence against another defendant is greater than that against the moving defendant. *United States v. Dickens*, 695 F.2d 765 (2nd Cir. 1982). Also, the fact that separate trials might offer a better chance for acquittal of one or more other defendants does not establish prejudice requiring severance. *United States v. Knowles*, 572 F.2d 267 (10th Cir. 1978). Accordingly, defendants' motions to sever are denied.

DENYING ALL DEFENDANTS' MOTIONS FOR PRODUCTION AND INSPECTION OF GRAND JURY MINUTES

The defendants have moved for the production and inspection of Grand Jury minutes. However, their motions seek the production of testimony of Grand Jury witnesses, pursuant to Rule 6(e), Federal Rules

of Criminal Procedure. However, the defendants do not allege or show that any grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury. Rule 6(e)(3)(C)(ii), Federal Rules of Criminal Procedure. Accordingly defendants' motions are denied.

DENYING ALL DEFENDANTS' MOTIONS *IN LIMINE*

The defendants Pinter and Garrison move to exclude from evidence the in-court identification of those defendants, citing the *Wade* and *Gilbert* decisions. Defendants' arguments are based on illegal pre-trial lineup procedures which would taint an in-court identification. There is no allegation or indication of such procedures herein, and the defendants are not entitled to a pre-trial lineup for identification purposes. *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); and their progeny. The motions in limine of defendants Pinter and Garrison are denied.

The defendants Felix and McNeil move to exclude from evidence prior bad acts and other offenses. Such evidence is not admissible, unless and until the government shows an exception as allowed by the Rules of Criminal Procedure. At this time these defendants' motions are denied, subject to proper objection being made at the time of trial by defendants.

DENYING DEFENDANTS PINTER AND GARRISON MOTIONS FOR A PRE-TRIAL *PETERSEN-ANDREWS* HEARING

The defendants Pinter and Garrison have moved for a pre-trial hearing on the determination of admissibility of co-conspirators statements. The court will determine the admissibility of such statements

at the time of trial pursuant to *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978) and *United States* v. *Petersen*, 611 F.2d 1313 (10th Cir. 1979). Accordingly, these defendants motions are denied.

DENYING DEFENDANTS FELIX AND McNEIL MOTIONS TO STRIKE SURPLUSAGE

The defendants Felix and McNeil have moved to strike the overt acts alleged in the conspiracy count, Count One, as surplusage. Although the allegation of overt acts is not necessary in a § 846 drug conspiracy, the allegation and proof of such overt acts is not improper or error. 21 U.S.C. 846. Accordingly, these motions of these defendants are denied.

GRANTING IN PART AND DENYING IN PART ALL DEFENDANTS MOTIONS FOR ALL DISCOVERY and ADDITIONAL DISCOVERY

All defendants have moved for discovery and additional discovery, including exculpatory materials, Jencks Act materials, and disclosure of deals, promises, and/or agreements made by the government. The government has responded that it will provide all discovery materials required by Rule 16, Federal Rules of Criminal Procedure. This court orders such discovery as is required by that Rule, as to all defendants, and insofar as defendants discovery requests are mandated by Rule 16, their motions are granted, otherwise, they are denied. The court orders that all discovery shall be in the United States Attorney's Office in Muskogee, Oklahoma, on or before 12:00 Noon, March 24, 1989.

The defendants' entitlement to exculpatory materials was established in *Brady v. Maryland*, 373 U.S. 83 (1963). Accordingly, the government is hereby directed to conduct a thorough examination of its files

with a view towards determining those items contained therein which may be of an exculpatory nature regarding these defendants. Because the pretrial determination of the exculpatory nature of any material is a duty imposed upon the prosecutor, many problems and disputes are likely to arise, if before the trial, the prosecutor's decisions in that regard are found to be inadequate. For example, disclosure is required of material which may be used to impeach *substantially* the credibility of *key* government witnesses. Obviously, the determination of what is substantial impeachment, or who is a key witness, hinges on subjective criteria. The court directs that the determination of such subjective criteria be on the side of disclosure, so that problems and disputes may be avoided. *See United States v. Agurs*, 427 U.S. 97 (1976). In this regard, the search of the government's files, as ordered herein, is not restricted to any class, category or characterization of the materials to be searched. Thus the government's search is to include, and is not limited to, statements made by any person with knowledge of this action, or facts involving this action, without regard to whether those statements were made to a government agent or to the grand jury. Likewise, this search is not restricted to the disclosure of statements of individuals, but includes documentary and other tangible evidence of every conceivable description. It includes all materials within the possession or under the control of the prosecution, including all governmental and law enforcement agents and agencies. Further, the government is to immediately notify counsel for the defendants upon discovery of any *Brady* materials, and to immediately disseminate such materials to the defendants.

The court orders that the government abide by its continuing obligation to promptly furnish defendants with any additional exculpatory evidence of which it subsequently has knowledge. Strict and good faith compliance by the government of the requirements of *Brady* and this order in all respects is hereby expressly directed.

Although the literal language of 18 U.S.C. § 3500 does not make a statement or report of a government witness or prospective witness the subject of discovery or inspection until such witness has testified on direct examination of the trial, such literal application often times runs afoul of the orderly administration of justice and constitutional rights.

The United States Attorney, as well as this court, has an ethical duty and responsibility to see that justice is done. Accordingly, the government is ordered to make every effort to voluntarily turn over to defense counsel Jencks Act statements or reports of known trial witnesses at least the day before such witness testifies, absent good cause shown to the contrary, e.g., threats of witness harassment or undue prejudice, in order to prevent the necessity of continual recesses to provide defense attorneys an opportunity to examine Jencks Act material and prepare their cross-examination.

DENYING DEFENDANTS PINTER AND GARRISON MOTIONS TO DISMISS

The defendants Pinter and Garrison have filed identical motions to dismiss on grounds of double jeopardy and delay in indictment. Defendants double jeopardy arguments are that the conspiracy count of the indictment, Count One, is duplicitous in that it charges more than one offense, and that Counts Two,

Three, Four, and Five are multiplicitous with each other and with Count One, in that they are but one offense. The defendants make no other allegations, explanations, or showing of how the indictment is either duplicitous or multiplicitous. The court has examined the indictment and finds that Count One charges one conspiracy offense, and that Counts Two, Three, Four, and Five of the indictment charge separate and distinct substantive offenses, each count requiring proof of a fact or element not required by the other. *United States* v. *Zwego*, 657 F.2d 248, 251 (10th Cir. 1981).

The court further finds the defendants argument for dismissal due to delay to be without merit, in that the indictment was brought well within the statute of limitations for all of the offenses contained therein. 18 U.S.C. 3282.

Accordingly, the motions to dismiss of the defendants Pinter and Garrison are denied.

DENYING THE MOTIONS OF DEFENDANTS FELIX AND McNEIL TO DISMISS

Both of these defendants have made motions to dismiss on the grounds that the indictment is too general and vague and fails to state any offense against these defendants. Defendant Felix also moves to dismiss on the grounds of double jeopardy.

In regard to both defendants contentions that the indictment is too vague and fails to state any offense against them, the court must look to the allegations in the indictment to determine its sufficiency. An indictment must allege all the elements of a crime charged. *United States v. Herbst*, 565 F.2d 638 (10th Cir. 1977); *United States v. Tye*, 519 F.2d 586 (10th Cir. 1975), *cert. denied*, 423 U.S. 989, 96 S.Ct.

400, 46 L.Ed. 2nd 306 (1975). It will generally be deemed sufficient if it sets forth the elements of the offense charged and apprises the accused on the nature of the crime charged, so that he will be enabled to prepare a defense and plead the judgment in bar. *United States v. Herbst*, supra; *United States v. Tokoph*, 514 F.2d 597 (10th Cir. 1975). As the Supreme Court stated in *Hambling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2nd 590 (1974):

> "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense . . . It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished'. 418 U.S. at 117."

The indictment herein sets out all the essential elements of the offenses charged and apprises defendants of the crimes with which they are charged. The indictment substantially follows the wording of the statutes, delineates the elements of the offenses charged and apprises the defendants of the nature and extent of the charges against them and of what they must be prepared to meet. The indictment contains sufficient information to enable defendants to prepare a defense to the charges and to plead the judgment in this case as a bar. Accordingly, the in-

dictment is sufficiently specific to withstand defendants' motions to dismiss the indictment.

Defendant Felix also moves to dismiss based on double jeopardy. This defendant was previously convicted of a violation of 21 U.S.C. 846, *Attempting* To Manufacture A Controlled Substance, in the Western District of Missouri. (Emphasis added). The § 846 offense in this indictment is for *Conspiracy* to Manufacture, in the Eastern District of Oklahoma. (Emphasis added). None of the other substantive counts charge *Attempting* To Manufacture, and they are all alleged to have occurred in the Eastern District of Oklahoma. The court finds the offenses herein are separate and distinct from defendant's conviction in Missouri, and his double jeopardy argument is without merit.

Accordingly, the motions to dismiss of defendants Felix and McNeil are denied.

IT IS ALL SO ORDERED this 20th day of March, 1989.

/s/ Frank H. Seay
FRANK H. SEAY
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 89-16-CR

UNITED STATES OF AMERICA, PLAINTIFF,

v.

FRANK DENNIS FELIX,
RODERICK MALCOLM MCNEIL, a/k/a "RICK",
DORA JEAN GARRISON, and
BILLY JOE PINTER, a/k/a "B.J.", DEFENDANTS.

[Filed 2-16-89]

INDICTMENT

The Grand Jury charges:

COUNT 1

(21 USC § 846)

A. *Objects of the Conspiracy*

From on or about the 1st day of May, 1987, and continuously thereafter to on or about the 31st day of August, 1987, in the Eastern District of Oklahoma and elsewhere, FRANK DENNIS FELIX, RODERICK MALCOLM MCNEIL, DORA JEAN

GARRISON, and BILLY JOE PINTER, the defendants herein, and Paul Dean Roach, an unindicted co-conspirator, wilfully and knowingly did combine, conspire, confederate and agree together, with each other, and with diverse others both known and unknown to the Grand Jury to commit offenses against the United States, in violation of Title 21, United States Code, Section 846, as follows:

(1) To knowingly and intentionally manufacture methamphetamine amphetamine, Schedule II controlled substances, contrary to Title 21, United States Code, Section 841(a)(1).

(2) To knowingly and intentionally possess with intent to distribute methamphetamine amphetamine, Schedule II controlled substances, contrary to Title 21, United States Code, Section 841(a)(1).

(3) To knowingly and intentionally distribute methamphetamine amphetamine, Schedule II controlled substances, contrary to Title 21, United States Code, Section 841(a)(1).

B. *Means of the Conspiracy*

The objects of the conspiracy were to be accomplished and were accomplished as follows:

Defendant FRANK DENNIS FELIX would provide financing, chemicals, and equipment for the setting-up of illegal laboratories for the manufacture of methamphetamine/amphetamine.

Defendants FRANK DENNIS FELIX, DORA JEAN GARRISON, RODERICK McNEIL, and BILLY JOE PINTER, and other unindicted co-conspirators both known and unknown to the Grand Jury, would acquire chemicals and equipment for the illegal manufacture of methamphetamine/amphetamine.

Defendant BILLY JOE PINTER would provide a location for the setting-up of illegal laboratories for the manufacture of methamphetamine/amphetamine in the Eastern District of Oklahoma.

Deefndants FRANK DENNIS FELIX, DORA JEAN GARRISON, RODERICK MALCOLM McNEIL, and BILLY JOE PINTER, and other unindicted co-conspirators both known and unknown to the Grand Jury, would manufacture methamphetamine/amphetamine for distribution in the Eastern District of Oklahoma and elsewhere.

Defendants FRANK DENNIS FELIX, DORA JEAN GARRISON, RODERICK MALCOLM McNEIL, and BILLY JOE PINTER, and other unindicted co-conspirators both known and unknown to the Grand Jury, would possess with intent to distribute and distribute methamphetamine.

C. *Overt Acts*

To effect the objects of the conspiracy, the defendants and others, known and unknown to the Grand Jury, committed diverse overt acts within the Eastern District of Oklahoma and elsewhere, among which were the following:

1. The defendant DORA JEAN GARRISON contacted an individual familiar with the manufacture of amphetamine named Paul Dean Roach in May of 1987, to arrange a meeting between defendant FRANK DENNIS FELIX and Roach.

2. GARRISON arranged a meeting between GARRISON, FELIX and Roach which was held at a graveyard east of Garland, Texas, in May of 1987.

3. At this meeting, FELIX and GARRISON and Roach discussed the manufacture of amphetamine. Roach was to "cook" the amphetamine and FELIX

was to furnish the necessary equipment and chemicals while learning how to "cook" from Roach. Pursuant to this agreement, Roach was to receive one pound of every five pounds he "cooked."

4. FELIX advised Roach he (FELIX) already had a location in Oklahoma for the lab site. The place to be maintained and used was property made available by B.J. PINTER in rural Okmulgee County, Oklahoma.

5. Roach travelled to the Oklahoma location following directions given him by FELIX.

6. Roach travelled to Okmulgee, Oklahoma, as directed by FELIX and met B.J. PINTER. B.J. PINTER and Roach then travelled to the Beggs, Oklahoma area.

7. PINTER and Roach moved travel trailers to the lab site in Okmulgee County and set-up the equipment.

8. In early June 1987, FELIX bought five pounds of phenylacetic acide and two 5000 milliliter single neck flasks.

9. On June 5, 1987, FELIX, "RICK" McNEIL, and another individual travelled to Tulsa, Oklahoma and purchased precursor chemicals for methamphetamine /amphetamine manufacture.

10. On June 16, 1987, B.J. PINTER bought four gallons of formamide, four gallons of methylamine and 110 pounds of phenylacetic acid from a chemical store located in Tulsa, OK.

11. On June 18, 1987, FELIX and another individual bought a 22 liter flask and a 22 liter heating mantle and five gallons of ether from a chemical store located in Tulsa, OK.

12. On July 1, 1987, FELIX and another individual bought more equipment and chemicals used in

the manufacture of methamphetamine from a chemical store located in Tulsa, OK.

13. On July 6, 1987, B.J. PINTER picked up an order of chemicals and miscellaneous items placed and paid for by FELIX on July 1, 1987, from a chemical store located in Tulsa, OK.

14. On July 8, 1987, PINTER bought two thermometers, electrical adapters, 100 grams of hydrochloric acid and two bottles of hydrogen chloride gas from a chemical store located in Tulsa, OK.

15. On July 13, 1987, "RICK" McNEIL travelled to Tulsa, Oklahoma and purchased equipment and chemicals utilized in methamphetamine manufacture. While at a chemical store in Tulsa, Oklahoma, McNEIL made a phone call to facilitate the manufacture of methamphetamine.

16. On July 13, 1987, PINTER bought drums of chemicals at a chemical store in Oklahoma City, Oklahoma, and transported them back to Okmulgee County, Oklahoma.

17. On August 26, 1987, FRANK DENNIS FELIX, while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine.

18. On August 31, 1987, FRANK DENNIS FELIX, while at a location in Missouri, posesssed chemicals and equipment necessary in the manufacture of methamphetamine.

All in violation of Title 21, United States Code, Section 846.

COUNT 2

(21 USC 841(a)(1) and 18 USC § 2)

On or about the 13th day of July, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX, RODERICK MALCOLM McNEIL, DORA

JEAN GARRISON, and BILLY JOE PINTER, defendants herein, did unlawfully, knowingly and intentionally manufacture methamphetamine, a Schedule II Controlled Substance.

All in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 3

(21 USC § 841(a)(1) and 18 USC § 2)

On or about the 13th day of July, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX, RODERICK MALCOLM McNEIL, DORA JEAN GARRISON, and BILLY JOE PINTER, defendants herein, did unlawfully, knowingly and intentionally possesses, with intent to distribute, approximately five and one-quarter pounds of methamphetamine, a Schedule II Controlled Substance.

All in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 4

(21 USC § 841(a)(1) and 18 USC § 2)

On or about the 13th day of July, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX, RODERICK MALCOLM McNEIL, DORA JEAN GARRISON, and BILLY JOE PINTER, defendants herein, did knowingly and intentionally possess approximately 4 gallons of methamphetamine oil, a Schedule II Controlled Substance, with intent to manufacture methamphetamine.

All in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 5

(21 USC § 841(a)(1) and 18 USC § 2)

On or about the 13th day of July, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX, RODERICK MALCOLM McNEIL, DORA JEAN GARRISON, and BILLY JOE PINTER, defendants herein, did knowingly and intentionally manufacture phenylacetone, a Schedule II Controlled Substance.

All in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 6

(21 USC § 856 and 18 USC § 2)

From on or about June 1, 1987, to on or about July 13, 1987, in the Eastern District of Oklahoma, FRANK DENNIS FELIX and BILLY JOE PINTER, did wilfully and knowingly maintain and/or make available for use a place and enclosure for the purpose of manufacturing a controlled substance, to-wit: methamphetamine/amphetamine, Schedule II Controlled Substances; in violation of Title 21, United States Code, Section 856 and Title 18, United States Code, Section 2.

COUNT 7

(18 USC §1952 and 18 USC § 2)

During the month of May, 1987, the exact date to the Grand Jury unknown, in the Eastern District of Oklahoma and elsewhere, the defendant DORA JEAN GARRISON wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent

to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine/amphetamine, in violation of federal statutes, Title 21, United States Code, Section 841(a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine/amphetamine, Schedule II Controlled Substances, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

COUNT 8

(18 USC § 1952 and 18 USC § 2)

On or about July 13, 1987, in the Eastern District of Oklahoma and elsewhere, the defendant DORA JEAN GARRISON wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent to promote, manage, establish, carry on, or faciltate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, in violation of federal statutes, Title 21, United States Code, Section 841(a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, a Schedule II Controlled Substance, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

COUNT 9

(18 USC § 1952 and 18 USC § 2)

On or about June 21, 1987, in the Eastern District of Oklahoma and elsewhere, the defendant FRANK DENNIS FELIX wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine/amphetamine, in violation of federal statutes, Title 21, United States Code, Section 841(a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying of an unlawful activity, to-wit: manufacture of methamphetamine/amphetamine, Schedule II Controlled Substances, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

COUNT 10

(18 USC § 1952 and 18 USC § 2)

On or about July 13, 1987, in the Eastern District of Oklahoma and elsewhere, the defendant FRANK DENNIS FELIX wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, in violation of federal statutes,Title 21, United States Code, Section 841 (a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, a Schedule II Controlled Substance, in violtation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

COUNT 11

(18 USC § 1952 and 18 USC § 2)

On or about July 13, 1987, in the Eastern District of Oklahoma and elsewhere, the defendant RODERICK MALCOLM McNEIL wilfully and knowingly traveled in interstate commerce, from the State of Texas to the Eastern District of Oklahoma and elsewhere, with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity,

to-wit: manufacture of methamphetamine, in violation of federal statutes, Title 21, United States Code, Section 841(a)(1), by travelling from the State of Texas to the Eastern District of Oklahoma, and thereafter attempted or aided or abetted other persons to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, to-wit: manufacture of methamphetamine, a Schedule II Controlled Substance, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1).

All in violation of Title 18, United States Code, Section 1952 and Title 18, United States Code, Section 2.

A TRUE BILL:

Grand Jury Foreman

ROGER HILFIGER
United States Attorney

PAUL G. HESS
Assistant United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

No. 87-05014-01-CR-SW-4

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FRANK DENNIS FELIX, DEFENDANT

[DOB: 6-14-44]

Count One: 21 U.S.C. § 846 and 841(a)(1)
NMT 20 years and or $1 million plus a minimum mandatory Special Parole Term of 3 years
$50 Mandatory Penalty Assessment

[Filed Sep. 15, 1987]

INDICTMENT

THE GRAND JURY CHARGES THAT:

Count One

From on or about August 26, 1987, to on or about August 31, 1987, in Jasper County, in the Western District of Missouri, and elsewhere, FRANK DEN-

NIS FELIX, knowingly and intentionally did attempt to manufacture methamphetamine, a Schedule II controlled substance; all in violation of Title 21, United States Code, Section 846 and 841(a)(1).

A TRUE BILL

/s/ Dan A. Daniel
Foreperson of the Grand Jury

/s/ Gregory K. Johnson
GREGORY K. JOHNSON
Assistant United States Attorney

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Supreme Court, U.S.
FILED
JUL 3 1991
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No. 90-1599

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK DENNIS FELIX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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No. 90-1599

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK DENNIS FELIX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The decision below was in accordance with the Fifth Amendment to the United States Constitution and the teaching of *Grady v. Corbin*, 110 S.Ct. 2084 (1990).

ARGUMENT

Grady v. Corbin, 110 S.Ct. 2084 (1990), set forth clearly for the first time the proposition that the Fifth Amendment to the United States Constitution "bars any subsequent prosecution in which the government, to establish an essential element of an offense charge in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 2093.

The Government admits, in its Petition for Certiorari, that the identical evidence was used to produce convictions in two separate jury trials in two separate *federal* jurisdictions for the same conduct. Petition for Certiorari, pages 2 through 9 entitled "Statement". By a plain reading of the opinions in the two "Felix Trials", it is plain that (1) the conduct presented at both trials is identical, (*United States v. Felix*, 926 F.2d 1522, 1529 (10th Cir. 1991), [citing *United States v. Felix*, 867 F.2d 1068, 1070-71 (8th Cir. 1989)]; (2) no *new evidence* was developed between the trials or presented at the second trial; (3) the *conduct* presented in the first trial to support the *essential element of intent and 'substantial step' requirements for conviction* was used in the second trial to prove *substantive offenses*, indicted in Oklahoma as Counts 1 through 6, (*U.S. v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991); (4) the government admitted at trial that the "Possession of chemicals and equipment necessary to the manufacture of methamphetamine, overt acts 17, and 18 in the present indictment, (Oklahoma) (Felix II), was the activity leading to defendant's conviction for attempted manufacture in the Western District of Missouri", and should not be permitted to argue to the contrary in this high Court. *U.S. v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991); (5) the offenses of *conspiracy and attempt* to violate Section 841(a)(1) of Title 21 U.S.C.A., are identical, and subject to identical proof.

The guarantee of the Fifth Amendment (Double Jeopardy Clause) protects against "a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969); *Brown v. Ohio*, 97 S.Ct. 2221, 2225 (1977).

The Government's Petition for Certiorari in this case mistakenly focuses on the dissent by Judge Anderson, and on the case of *Dowling v. United States*, 110 S.Ct. 668 (1990), decided before *Grady v. Corbin*, and dealing with Rule 404(b) evidence. In *Dowling*, evidence of an identification in an unrelated robbery was allowed, even though the defendant had been acquitted, where *"the prior acquittal did not determine an ultimate issue in the present case." Dowling v. U.S.*, 110 S.Ct. 668, 672 (1990).

The case of *United States v. Calderone*, 917 F.2d 717 (2nd Cir. 1990), denigrated in the government's petition for certiorari at pp. 6 and 14, is directly on point in this case, and correctly decided. There, the government carved a smaller conspiracy out of a larger conspiracy for which the defendant was acquitted. Here, the government charged in Oklahoma a larger conspiracy out of facts proved in Missouri to support the intent requirement and substantial step requirement of a prosecution for attempt.

"Where successive prosecutions are at stake, the guarantee (of the Fifth Amendment Double Jeopardy Clause) serves 'a constitutional policy of finality for the defendant's benefit.' *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (plurality opinion). That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, see *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); cf. *United States v. Martin Linen Supply Co.*, 430 U.S. 5674, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), and from attempts after a prior conviction and sentence, see *Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); cf. *North Carolina v. Pearce, supra.*"

Brown v. Ohio, 97 S.Ct. 2221, 2225 (1977).

As an aside to this multiple prosecution, the undersigned attorney was jailed for contempt in his attempt to prevent yet a *third prosecution* of his client. In 1989, the U.S. attorney sought to compel information from the attorneys concerning *fees received in defending Felix and his co-defendants*, with the intention of prosecution Felix under the CCE statute in the *Northern District of Oklahoma*. See *U.S. v. Anderson*, 906 F.2d 1485 (10th Cir. 1990).

CONCLUSION

The Constitution of the United States protects the citizens from government, and does not constitute legislation enabling the reduction of the liberties set forth therein. No possible interpretation of the double jeopardy

clause of the Fifth Amendment will permit these successive prosecutions. Therefore, the Petition of the Government for Certiorari should be denied.

Respectfully submitted,

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No. 90-1599

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DENNIS FELIX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a defendant may be prosecuted for a drug conspiracy after previously having been prosecuted for a substantive drug offense based on the same conduct that is alleged in some of the overt acts of the conspiracy charge.

2. Whether prosecution of respondent for substantive drug offenses in connection with the operation of a drug laboratory in Oklahoma is barred because he was previously prosecuted for attempting to set up a drug laboratory in Missouri, where evidence of his conduct with respect to the Oklahoma laboratory had been introduced in the Missouri prosecution as evidence of his intent to commit the Missouri offense.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 926 F.2d 1522. The opinion of the district court (Pet. App. 41a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1991. The petition for a writ of certiorari was filed on Apr. 15, 1991, and was granted on October 7, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. On September 15, 1987, respondent was indicted in the Western District of Missouri for attempting to manufacture methamphetamine between August 26, 1987, and August 31, 1987, in violation of 21 U.S.C. 846. Pet. App. 62a-63a. He was convicted and his conviction was affirmed by the Eighth Circuit, 867 F.2d 1068 (1989).

At respondent's trial on the Missouri indictment, the government introduced evidence that on August 26, 1987, respondent met with George Dwinnells, who owned a firm in Tulsa, Oklahoma, that sold scientific equipment and supplies. Unbeknownst to respondent, Dwinnells was a DEA informant. At trial, Dwinnells testified that respondent sought to purchase chemicals and equipment needed to make methamphetamine. Respondent made a down payment of $7,500 toward the purchase and gave Dwinnells instructions for securing a trailer to transport the merchandise. In later telephone conversations, respondent increased his order for chemicals and equipment and instructed Dwinnells to deliver the items to a Joplin, Missouri, hotel on August 31, 1987. Dwinnells met respondent at the hotel on the designated date. Respondent was arrested after inspecting the chemicals and equipment and hitching his car to the trailer in which Dwinnells had transported them. 867 F.2d at 1070-1071.

Respondent's defense in the Missouri case was that "he never had criminal intent, but had been acting under the mistaken belief that he was working in a covert DEA operation." 867 F.2d at 1074. Accordingly, the government introduced evidence pursuant to Fed R. Evid. 404(b) that respondent had been involved earlier in 1987 in manufacturing methamphetamine in Oklahoma. See 867 F.2d at 1072-1073. That evidence showed that during the spring of 1987 respondent had bought chemicals and materials for making methamphetamine from Dwinnells and had furnished those supplies to government witness Paul Roach in exchange for lessons on how to manufacture the drug. Roach testified that he and respondent had used the chemicals and equipment to produce methamphetamine in a trailer near Beggs, Oklahoma. On July 13, 1987, law enforcement agents seized the unattended trailer, but they did not arrest respondent at that time. 867 F.2d at 1070-1071.

The trial court instructed the jury as follows with respect to evidence of the Oklahoma transactions:

> You have heard evidence that the defendant previously committed a crime similar to the one charged in this case. You may not use this evidence to decide whether the defendant carried out the physical acts involved in the crime charged here. However, if you are convinced beyond a reasonable doubt, by other evidence, that the defendant did carry out the physical acts involved in the crime charged here, then you may consider this evidence only on the question of motive, opportunity, preparation, plan, knowledge, identity or absence of mistake.

867 F.2d at 1074-1075. Thus, evidence of the Oklahoma transactions was admitted in the Missouri prosecution solely to show respondent's state of mind with respect to the chemicals he arranged to have delivered in Missouri. The Eighth Circuit found the evidence concerning the methamphetamine laboratory in Okla-

homa to be "highly probative of [respondent's] knowledge and intent," and thus admissible under Rule 404(b). 867 F.2d at 1073.

2. On February 16, 1989, respondent was named in eight counts of an 11-count indictment filed in the Eastern District of Oklahoma. Pet. App. 51a-61a. Count 1 charged that he conspired with five other individuals in the Eastern District of Oklahoma and elsewhere between May 1, 1987, and August 31, 1987, to manufacture, possess, and distribute methamphetamine, in violation of 21 U.S.C. 846. Respondent was named in nine of the 18 overt acts that the indictment charged had been committed "[t]o effect the objects of the conspiracy." Pet. App. 53a. Two of the nine overt acts in which respondent was named took place within the time period of the Missouri indictment. Overt act 17 charged that "[o]n August 26, 1987, [respondent], while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine." Pet. App. 55a. Overt act 18 charged that "[o]n August 31, 1987, [respondent], while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." *Ibid.*

Respondent was also named in seven substantive counts of the Oklahoma indictment. Counts 2 through 5 charged that on or about July 13, 1987, in the Eastern District of Oklahoma, respondent had manufactured methamphetamine (Count 2), possessed methamphetamine with intent to distribute it (Count 3), possessed methamphetamine oil with intent to manufacture methamphetamine (Count 4), and manufactured phenylacetone, a methamphetamine precursor

(Count 5), all in violation of 21 U.S.C. 841(a)(1). Pet. App. 55a-57a. Count 6 charged that, between June 1, 1987, and July 13, 1987, in the Eastern District of Oklahoma, respondent maintained a place and enclosure for manufacturing methamphetamine, in violation of 21 U.S.C. 856. Pet. App. 57a. Counts 9 and 10 charged that, on or about June 21, 1987 (Count 9) and July 13, 1987 (Count 10), Felix traveled from Texas to the Eastern District of Oklahoma with intent to promote the manufacture of methamphetamine and thereafter attempted to promote that activity, in violation of 18 U.S.C. 1952. Pet. App. 59a-60a.

At trial, the government introduced much of the same evidence that had been introduced in the Missouri trial. Respondent was convicted on all counts and sentenced to serve concurrent 20-year terms of imprisonment on Counts 1 through 6 and five-year terms of imprisonment on Counts 9 and 10. The 20-year sentence imposed for the Oklahoma offenses was set to run consecutively to the sentence imposed for respondent's Missouri conviction.

3. A divided panel of the Tenth Circuit reversed respondent's convictions on Counts 1 through 6 of the Oklahoma indictment, and affirmed his convictions on Counts 9 and 10.

a. The court held that the conspiracy offense charged in Count 1 was barred by this Court's decision in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990). In *Grady*, the Court held that a subsequent prosecution was barred where "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."

110 S. Ct. at 2093. The court of appeals held that for purposes of applying *Grady* to a conspiracy charge, it is the conduct from which the jury is asked to infer a conspiratorial agreement—rather than the agreement itself—that is considered to be the conduct for which the defendant is prosecuted. Pet. App. 13a. The court then summarized the proof presented in the Missouri trial, as recounted by the Eighth Circuit, and concluded that "[a]s to Count 1, the conspiracy charge, the duplication was extensive." *Id.* at 15a.

The court pointed out that in both trials the government proved the whole course of conduct in which respondent learned to make methamphetamine and set up the Oklahoma lab. Furthermore, in both trials the government proved that, after the raid on the Oklahoma lab, respondent purchased chemicals and equipment for setting up a new lab and took delivery of those materials in Joplin, Missouri. The court noted that respondent's conduct in arranging for the purchase of the materials and taking delivery of them, were listed as overt acts in the Oklahoma conspiracy count. Pet. App. 15a-17a. The court also noted that both the Missouri indictment and the Oklahoma conspiracy count focused on the actions of respondent and Roach, and that both the Missouri and Oklahoma charges alleged conduct that took place outside their respective States. Finally, the court found that "the relevant time frames of the two indictments also overlap." *Id.* at 18a. The court stated that "[t]he Missouri prosecution was premised on conduct that occurred from the spring of 1987 to August 31, 1987," while the Oklahoma conspiracy count charged conduct that occurred from approximately May 1,

1987, to August 31, 1987. *Ibid.* Based on those facts, the court concluded that the Oklahoma conspiracy count charged "the same conduct for which [respondent] was previously convicted in Missouri" and that prosecution on the Oklahoma conspiracy charge was therefore barred by the Double Jeopardy Clause. *Ibid.*

With respect to the substantive offenses charged in Counts 2 through 6, the court noted that in both trials the government proved that respondent had bought chemicals and equipment to manufacture methamphetamine, that he used those chemicals to produce methamphetamine at the Beggs, Oklahoma, trailer, and that the trailer was subsequently seized by law enforcement authorities. Pet. App. 18a-19a. That evidence was used to show intent in the Missouri trial and as direct evidence of the Oklahoma charges.[1] Because the government relied on the same evidence to prove critical elements of the substantive offenses charged in each case, the court of appeals concluded that respondent's convictions on Counts 2 through 6 had to be reversed. *Id.* at 18a-20a.

Finally, the court affirmed respondent's convictions on Counts 9 and 10, charging interstate travel on

[1] The court of appeals mistakenly stated that evidence of respondent's conduct in connection with the Beggs lab was used in the Missouri prosecution to "establish[]" the "substantial step" element of the attempt offense. Pet. App. 17a; see also *id.* at 20a. Compare 867 F.2d at 1071. As the excerpt from the Missouri jury instructions quoted above makes clear, the Missouri jury was instructed that it could consider the evidence only "on the question of motive, opportunity, preparation, plan, knowledge, identity or absence of mistake." Pet. App. 26a.

June 21 and July 13, 1987, to promote the manufacture of methamphetamine. According to the court, the conduct alleged in those counts was not sufficiently related to the conduct proved in the Missouri trial to require those counts to be dismissed under the Double Jeopardy Clause. Pet. App. 20a-21a.

b. Judge Anderson dissented from the dismissal of the first six counts of the Oklahoma indictment. He noted that, even after *Grady*, a mere overlap of proof in two prosecutions does not establish that the second prosecution is barred by the Double Jeopardy Clause. Pet. App. 23a & n.1. Instead, Judge Anderson explained, *Grady* requires a showing that (1) the conduct sought to be proved in the second prosecution "constitutes an offense for which the defendant has already been prosecuted," and (2) the conduct is "being proven to establish an essential element" of the second prosecution. Pet. App. 24a. In Judge Anderson's view, that test did not require reversal of any of respondent's convictions.

First, Judge Anderson argued that the conduct charged in the conspiracy count did not "constitute[] an offense for which the defendant has already been prosecuted." Pet. App. 24a. Although the Oklahoma conspiracy count contained two overt acts that pertained to the events that were the subject of the Missouri offense, Judge Anderson found that the inclusion of those overt acts did not convert the Oklahoma conspiracy into the "same offense" as the substantive crime of attempt for which respondent was prosecuted in Missouri. An attempt, he explained, consists of two elements—intent and a substantial step toward commission of the offense—and the proof that established the overt acts in the conspiracy indictment at most established the "substantial step" element of

the attempt offense. Pet. App. 31a. In Judge Anderson's view, *Grady* barred the conspiracy prosecution only if the government proved the entirety of the attempt offense (rather than a single element of that offense) in seeking to establish the conspiracy. Pet. App. 32a.

In addition, Judge Anderson concluded that the two overt acts relating to the Missouri attempt offense did not "establish an essential element" of the conspiracy charge. First, he noted, a drug conspiracy does not require proof of an overt act, and thus an overt act is not an essential element of the crime. Pet. App. 32a. Second, the overt acts relating to the attempt did not "establish" the element of agreement. Judge Anderson explained that while evidence of the Missouri offense might have tended to support the proof of agreement in Count 1 of the Oklahoma indictment, *Grady*'s requirement that the conduct charged in the prior offense "establish" an essential element of the subsequent offense means that the conduct must "constitute the entirety of" that element, not that it simply provides evidence that helps establish that element. Pet. App. 34a (quoting *United States* v. *Calderone*, 917 F.2d 717, 724 (2d Cir. 1990) (Newman, J., concurring)). In sum, Judge Anderson concluded, *Grady*'s plain language compelled the conclusion that the "conduct constituting the offense" for which respondent had previously been prosecuted, *i.e.*, "conduct constituting an attempt to manufacture methamphetamine between August 26 and 31, 1987," did not serve "to establish an essential element of the conspiracy charge" in respondent's Oklahoma prosecution. Pet. App. 39a.

With respect to the substantive counts, Judge Anderson noted that each of them "was based on [re-

spondent's] conduct on or before July 13, 1987, in establishing and operating the methamphetamine lab in Beggs, Oklahoma." Pet. App. 25a. In contrast, the Missouri court alleged conduct that took place more than a month later, on August 26-31, 1987. Pet. App. 25a. Although the government had introduced evidence in the Missouri trial concerning respondent's pre-August conduct, Judge Anderson stated that introducing evidence of a prior, uncharged act to establish the defendant's intent "is not prosecution for that act." Pet. App. 26a. Respondent's "involvement in manufacturing methamphetamine at the lab in Beggs, Oklahoma, was temporally and geographically separate from his subsequent attempt to manufacture methamphetamine in Missouri, which occurred over a month after the Beggs lab was raided." Pet. App. 27a.

SUMMARY OF ARGUMENT

I. It has long been settled that a conspiracy and a substantive offense committed in furtherance of the conspiracy may be prosecuted separately. The court of appeals nonetheless held that respondent's prior conviction on the Missouri attempt charge barred the conspiracy count of this indictment. To reach that result, the court of appeals invoked this Court's recent decision in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990). *Grady*, however, is inapposite here.

Grady involved a single traffic accident that led to successive prosecutions, the first for traffic violations and the second for assault and homicide resulting from the accident. In the assault and homicide prosecution, the State proceeded on a theory whereby the fact that the defendant had committed the traffic violations that were the subjects of the earlier pros-

ecution would necessarily have established the State's case with respect to the defendant's conduct and mental state. The State could establish the assault and homicide offenses simply by proving the commission of the traffic violations and then showing that those violations resulted in injury and death. In effect, under the State's theory the traffic violations were lesser included offenses of the homicide and assault crimes.

The situation is quite different in the case of sequential prosecutions for a substantive offense and a related conspiracy charge. A substantive offense is not a lesser included offense of a conspiracy (or vice versa), because each offense requires proof of an element not required by the other, even if the two charges arise from the same transaction. In *Grady*'s terms, proof of the Missouri attempt offense would not have "establish[ed]" an essential element of the conspiracy charge, see 110 S. Ct. at 2093, although evidence relating to the Missouri offense was relevant in proving the conspiracy. *Grady* therefore does not support the court of appeals' conclusion that respondent's prosecution for conspiracy was barred by his prior prosecution for attempt.

II. The court of appeals also erred in reversing respondent's convictions of the five substantive counts relating to the Beggs, Oklahoma, drug laboratory. Those charges were not by any means the "same" for double jeopardy purposes as the previously prosecuted Missouri charge, which related to respondent's subsequent efforts to set up another drug laboratory. Although the evidence introduced against respondent in the two trials substantially overlapped, the mere overlap of evidence does not convert two offenses into one within the meaning of the Double Jeopardy

Clause. That principle has been established by a series of this Court's decisions, and it was reaffirmed in *Grady* itself. The court of appeals' reversal of respondent's convictions on the five substantive counts was therefore erroneous.

ARGUMENT

I. A CONSPIRACY AND A RELATED SUBSTANTIVE CRIME ARE NOT THE "SAME OFFENSE" FOR PURPOSES OF THE DOUBLE JEOPARDY CLAUSE

A. This Court Has Always Treated Conspiracies And Substantive Crimes As Separate Offenses

Under the traditional test, two crimes are not "the same offense" within the meaning of the Double Jeopardy Clause if each requires proof of a fact that the other does not. *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).[2] That test has been applied to prosecutions for conspiracy and substantive offenses on numerous occasions, and this Court has consistently held that a conspiracy and a substantive crime arising from the same transaction are not the "same offense" for double jeopardy purposes.

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[2] As the Court stated in *Blockburger* itself, that test applies only where "the *same act or transaction* constitutes a violation of two distinct statutory provisions." *Blockburger* v. *United States*, 284 U.S. at 304 (emphasis added). The Court expressed "serious doubts" in *Garrett* v. *United States*, 471 U.S. 773, 790 (1985), whether the simple *Blockburger* analysis is applicable to compound-predicate offenses that by their nature require the proof of multiple acts of criminal conduct together with other elements. See 471 U.S. at 789 (counseling "caution against ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation presented in *Brown* [v. *Ohio*, 432 U.S. 161 (1977),] to the multilayered conduct, both as to time and to place, involved in [*Garrett*]").

For example, in *United States* v. *Bayer*, 331 U.S. 532 (1947), the defendant, an Air Force officer, was found guilty in court-martial proceedings of receiving payments in return for transferring soldiers to noncombat units. 331 U.S. at 541. This Court held that his subsequent prosecution on charges of conspiring to defraud the government by depriving it of his faithful services was not barred even though it was based on the same underlying incidents. 331 U.S. at 533. As the Court stated, the "essence" of a conspiracy offense "is in the agreement or confederation to commit a crime," which "is punishable whether or not the contemplated crime is consummated." 331 U.S. at 542. The conspiracy charge thus required proof of an agreement, while the court-martial offense required proof of the completed crime. In language directly applicable to this case, the Court concluded that "the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself." 331 U.S. at 542. This Court has reaffirmed that principle often and recently. See *Garrett* v. *United States*, 471 U.S. 773, 778 (1985); *Iannelli* v. *United States*, 420 U.S. 770, 781-782 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946); cf. *Burton* v. *United States*, 202 U.S. 344, 377 (1906) (statute prohibiting both agreement to receive compensation unlawfully and receipt of such compensation defines two distinct crimes).

Under that principle, respondent's conspiracy conviction is not subject to challenge on double jeopardy grounds. Respondent was charged in the Oklahoma

indictment with conspiring with others to manufacture, possess, and distribute methamphetamine from May through August 1987. To convict respondent, the government had to prove that there was an agreement among at least two individuals to manufacture, possess, and distribute methamphetamine, and that respondent joined that agreement. The government did not have to prove that any substantial step was taken toward manufacturing methamphetamine. As the Eighth Circuit explained, to obtain a conviction in the Missouri case, the government had to prove that respondent took a substantial step toward manufacturing methamphetamine. 867 F.2d at 1071. But the government did not have to prove that he agreed with anyone to do so.

There is nothing unusual about the relationship between the conspiracy and attempt offenses charged in the two indictments at issue in this case. Defendants are often charged separately with a conspiracy and the substantive offense that was the object of the conspiracy. And it is not unusual for the two charges to be brought in separate prosecutions, particularly where, as in this case, the conduct pertaining to each offense was based in different jurisdictions.[3]

[3] The fact that this case involves an attempt as opposed to a completed substantive offense does not alter the analysis. See *United States* v. *Marden*, 872 F.2d 123, 125-126 (5th Cir. 1989); *United States* v. *Savaiano*, 843 F.2d 1280, 1282 (10th Cir.), cert. denied, 488 U.S. 836 (1988); *United States* v. *Alonso*, 673 F.2d 334, 337 (11th Cir.), cert. denied, 459 U.S. 874 (1982); *United States* v. *Anderson*, 651 F.2d 375, 378-379 (5th Cir. 1981); *United States* v. *Snell*, 592 F.2d 1083, 1085-1086 (9th Cir.), cert. denied, 442 U.S. 944 (1979); *Brinkley* v. *United States*, 560 F.2d 871, 874 (8th Cir.), cert. denied, 434 U.S. 941 (1977). The Ninth Circuit has held, as a matter of statutory construction (and not as a matter of double jeopardy law), that a single act may not be charged as both a conspiracy and an attempt under 21 U.S.C. 846. *United States* v. *Touw*, 769 F.2d 571 (9th Cir. 1985). While we believe that the decision in *Touw* is incorrect, the Ninth Circuit has in any event limited it to cases in which the attempt and the conspiracy arise from a single act; it does not apply where, as in this case, the defendant attempts or conspires to violate the drug laws on more than one occasion. *United States* v. *McQuisten*, 795 F.2d 858, 868 (9th Cir. 1986).

Before the decision of this Court two Terms ago in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), there would have been no question that the conspiracy charged in the Oklahoma indictment and the attempt charged in the Missouri indictment were separate offenses for double jeopardy purposes. The question posed by this case is whether *Grady* v. *Corbin* requires this Court to jettison a century of precedent and to hold that a conspiracy and a related substantive crime may not be the subject of separate prosecutions, because they must be regarded as the "same offense" within the meaning of the Double Jeopardy Clause.

B. *Grady* v. *Corbin* Did Not Alter The Well-Settled Rule That Conspiracies And Substantive Crimes Are Separate Offenses

The only support offered by the court of appeals for its departure from the settled principles discussed above was this Court's decision in *Grady* v. *Corbin*. *Grady*, however, does not govern this case.

1. The defendant in *Grady* was driving while legally drunk. His car crossed the median line of a two-way highway and hit another car, killing one of the occupants and injuring the other. The defendant first pleaded guilty to the traffic violations of driving while intoxicated and crossing the median line in con-

nection with an automobile accident. He was subsequently prosecuted on homicide and assault charges arising from the accident. See 110 S. Ct. at 2087-2089.

The second prosecution in *Grady* was not barred under the *Blockburger* "elements" test, because the traffic violations were not technically lesser included offenses of the homicide or assault charges. Cf. *Schmuck* v. *United States*, 489 U.S. 705, 715-721 (1989). The traffic violations required proof that the defendant was operating a motor vehicle, which was not required in the case of the homicide and assault offenses. The homicide and assault offenses, in turn, required proof of injury or death to another person, which was not an element of the traffic violations. Nonetheless, the Court held that the homicide and assault charges were barred because of the defendant's prior guilty pleas to the traffic violations. 110 S. Ct. at 2094-2095. The Court stated as the rule of the case that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 110 S. Ct. at 2093.

The Court in *Grady* relied heavily on the decisions in *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980). See *Grady*, 110 S. Ct. at 2090, 2092-2093 & n.11. In *Harris*, the Court held that a defendant could not be prosecuted for robbery with a firearm after having been convicted of felony murder based on the same robbery. The Court in *Grady* explained that the offenses at issue in *Harris* were not "the same" under the traditional *Blockburger* test because, "as a

statutory matter, felony murder could be established by proof of any felony, not just robbery, and robbery with a firearm did not require proof of a death." *Grady*, 110 S. Ct. at 2092. But even though the offenses were not the "same" under *Blockburger*'s pure statutory analysis, the Court held that the offenses were rendered the same by the manner in which they were charged and proved at trial. The prosecution in *Harris* apparently proved the greater offense of felony murder simply by re-proving the lesser offense of robbery in its entirety and adding evidence that a death occurred in the course of the robbery. See 433 U.S. at 682 n.*. For double jeopardy purposes, the Court concluded, the robbery should be treated as a lesser included offense of felony murder. See *Grady*, 110 S. Ct. at 2092-2093; *Illinois* v. *Vitale*, 447 U.S. at 420 (the Court in *Harris* "treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense").[4]

In *Vitale*, the State first convicted the defendant of carelessly failing to reduce speed to avoid an ac-

[4] Although *Whalen* v. *United States*, 445 U.S. 684 (1980), was a multiple punishment case rather than a successive prosecution case, the Court's analysis in *Whalen* paralleled its analysis in *Harris*. In *Whalen*, the defendant was convicted of both rape and felony murder; the felony murder conviction was based on a statute providing that a killing committed in the course of any of six specified felonies constitutes murder, even in the absence of an intent to kill. See 445 U.S. at 686. The Court treated the rape as, in effect, a lesser included offense of felony murder, explaining that it was "unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." 445 U.S. at 694. See also *Payne* v. *Virginia*, 468 U.S. 1062 (1984).

cident, and then prosecuted him for involuntary manslaughter based on the two fatalities that resulted from the accident. The Court noted that if a careless failure to slow is not always a necessary element of manslaughter, the two offenses would not be the "same" under the traditional *Blockburger* test. Nonetheless, the Court suggested that the State would face a "substantial" double jeopardy hurdle if it "[found] it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure." 447 U.S. at 420. In that event, the Court explained, the defendant would "already [have] been convicted [of] conduct that is a necessary element of the more serious [charge]." *Ibid.*

The Court's reasoning in *Grady* was similar to that in *Harris* and *Vitale*. In both *Grady* and *Harris*—and by hypothesis in *Vitale*—the State sought to establish both the defendant's conduct and his mental state by proving that he had committed the previously adjudicated offenses.[5] In each case, the greater offense required proof of other facts in addition to those involved in the lesser offense (such as

[5] To be sure, the State's bill of particulars in *Grady* stated that the State intended to prove the recklessness or negligence necessary to sustain the homicide and assault charges by proving not only that the defendant was guilty of the two traffic offenses for which he had already been convicted —driving while intoxicated and failing to keep to the right of the median—but also by proving that the defendant had committed a third traffic offense—driving faster than was safe in the road conditions that prevailed at the time of the accident. 110 S. Ct. at 2089. Insofar as the State intended to proceed on this third theory, however, the Court held that the prosecution would not be barred, a holding that paralleled the Court's analysis in *Vitale*. See *Grady*, 110 S. Ct. at 2094; *Vitale*, 447 U.S. at 421.

the victim's injury or death). But the Court held in both cases that a second prosecution could not proceed if, under the prosecution's theory of the case, proof of the greater offense would necessarily establish the lesser.[6] In that setting, the lesser offense would become simply an "incident[] included" in the greater offense, see *Harris*, 433 U.S. at 683, quoting *In re Nielsen*, 131 U.S. 176, 188 (1889), and successive prosecutions would be barred.

While *Grady* licensed a limited inquiry into the prosecution's proof for purposes of determining whether a successive prosecution would violate the Double Jeopardy Clause, it made clear that the Double Jeopardy Clause does not mandate a "same evidence" test. See 110 S. Ct. at 2093. That is, a second prosecution is not barred simply because the government proves the second offense by relying on the same evidence that it used to prove the first offense.

The *Grady* Court's disclaimer of any intention to create a "same evidence" test supports Judge Anderson's interpretation of *Grady* in the court below, *i.e.*, that *Grady's* reference to proving "conduct that constitutes an offense for which the defendant has already been prosecuted" does not mean that two offenses are the same for double jeopardy purposes if the government seeks to prove one of the offenses by introducing evidence that was used to prove the

[6] In *Harris*, the State prosecuted first for the greater offense of murder and then for the lesser offense of robbery with a firearm, while in *Grady* the order of prosecution was reversed. The *Grady* Court, however, expressly noted that "it is irrelevant for the purposes of the Double Jeopardy Clause whether the conviction of the greater offense precedes the conviction of the lesser offense or vice-versa." 110 S. Ct. at 2093 n.11.

other. The Court's formulation appears instead to be an effort to put in general terms the much more modest point that in order for two crimes to constitute the "same offense," one of them must be a lesser included offense of the other, either as a strictly legal matter or as a practical matter in light of the way the case is charged and tried. That is, it is not sufficient to avoid the double jeopardy bar that the second offense could theoretically be established without re-proving the first offense; if the government's theory of the case will require it to re-prove the first offense in order to establish the second, the second prosecution is barred. That interpretation of the Court's language in *Grady*, we submit, is consistent with the facts that were before the Court in *Grady*, and it accommodates *Grady* to well-settled principles of double jeopardy law such as the principle that a conspiracy and any related substantive crimes are separate offenses.

2. Under this analysis, *Grady* does not require dismissal of the conspiracy count in the Oklahoma indictment. In *Grady*, the State sought in effect to establish the defendant's mens rea and actus reus by simply re-proving the traffic violations for which he had previously been prosecuted. All that would remain to complete the proof of the assault and homicide charges would be for the State to show that the traffic violations resulted in injury and death. In this case, by contrast, re-proving the elements of the Missouri attempt offense would not establish the Oklahoma conspiracy offense or any essential element of that offense. There is no reason to believe that the government intended to prove—or could have proved—the agreement charged in the conspiracy count simply by proving that respondent had previ-

ously committed the offense of attempting to manufacture methamphetamine in Missouri.

Although respondent's conduct in connection with the Missouri attempt provided evidence of the nature and extent of the conspiratorial agreement, the agreement was not itself established by the evidence of respondent's Missouri conduct. The jury could have convicted respondent of the conspiracy count even if it disbelieved all the evidence concerning respondent's Missouri conduct, and it could have acquitted him of the conspiracy even if it had found that he committed the crime of attempt in Missouri. Accordingly, although evidence of respondent's Missouri conduct was probative as to the agreement charged in the conspiracy count, respondent was not in effect prosecuted a second time for attempting to manufacture methamphetamine in Missouri.

3. The court of appeals relied heavily on two factors in reversing respondent's conviction. First, much of respondent's conduct that was charged as part of the conspiracy count in this case was introduced in evidence in the earlier Missouri trial. Second, two of the acts that respondent committed in the course of his Missouri attempt offense were charged as overt acts in the Oklahoma conspiracy charge. Neither of those factors, however, provides a basis for holding that respondent's prosecution in this case was jeopardy barred.

a. The overlap in proof between the two cases does not establish a violation of the Double Jeopardy Clause. Indeed, if *Grady* is interpreted to foreclose prosecution for an offense simply because evidence of the commission of that offense was relevant to a prosecution for a different crime, the double jeopardy rule of *Grady* will have been converted into the

"same evidence" test. In that event, to avoid the bar of double jeopardy the government will have to avoid any reference in one prosecution to acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution. The Court in *Grady* disclaimed any intention to create such a rule, see 110 S. Ct. at 2093 & n.12, and such a rule, if adopted, would fly in the face of almost 100 years of this Court's precedents.

In *Gavieres* v. *United States*, 220 U.S. 338 (1911), a defendant was first convicted of behaving in an indecent manner in a public place, and was subsequently convicted of insulting or threatening public officials. *Id.* at 341-342.[7] The Court held that, notwithstanding the fact that "the acts and words of the accused set forth in both charges are the same," there was no double jeopardy bar to the second prosecution. *Id.* at 342. As the court observed, "while the transaction charged is the same in each case, the offenses are different." *Ibid.* See also *Burton* v. *United States*, 202 U.S. 344, 380 (1906) (no double jeopardy bar "if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact*"); *Carter* v. *McClaughry*, 183 U.S. 365, 395 (1902).

If there were any doubt that mere overlap in proof is insufficient to trigger a double jeopardy bar, that

[7] *Gavieres* was a Philippines prosecution that arose while the Philippines were under United States jurisdiction. While the case was not governed directly by the Double Jeopardy Clause, it was governed by an Act of Congress that had been construed to provide an equivalent protection in Philippines prosecutions. See 220 U.S. at 341; *Kepner* v. *United States*, 195 U.S. 100 (1904). Accordingly, the Court's analysis in *Gavieres* is based on constitutional double jeopardy principles.

doubt was laid to rest in *Dowling* v. *United States*, 493 U.S. 342 (1990). The defendant in *Dowling* was convicted of bank robbery. To prove his identity at trial, the government introduced evidence under Fed. R. Evid. 404(b) concerning a previous, unrelated robbery for which the defendant had been tried and acquitted. The Court rejected the defendant's contention that his conviction had to be reversed on double jeopardy grounds. To be sure, the Court based this portion of its ruling on the collateral estoppel component of the Double Jeopardy Clause, which is inapplicable here because respondent was convicted in his earlier trial. But the Court in *Dowling* would never have had to reach the collateral estoppel issue if the Double Jeopardy Clause itself barred prosecution for an offense merely because the government intended to introduce a substantial amount of evidence at trial that had been introduced against the defendant in an earlier criminal trial for another offense.[8]

b. In reversing respondent's conviction, the court of appeals also relied heavily on the fact that two of the overt acts alleged in the conspiracy count related to respondent's purchase and possession of chemicals and equipment in late August 1987 in connection with his attempt to set up a second methamphetamine lab. The inclusion of those overt acts in the Oklahoma conspiracy count, however, does not affect the double jeopardy analysis.

[8] This Court's opinion in *Grady* cited *Dowling* with approval for the proposition that "the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." 110 S. Ct. at 2093.

First, 21 U.S.C. 846 does not require proof of an overt act. See, *e.g.*, *United States* v. *Clark*, 928 F.2d 639, 641 (4th Cir. 1991) (collecting cases). For that reason, the overt acts in this case were pure surplusage. The proof of the Missouri attempt therefore did not establish an essential element of the Oklahoma conspiracy charge.

Second, and more fundamentally, overt acts are simply steps taken to further the objectives of the conspiracy, which demonstrate that the conspiracy is in effect. See *Yates* v. *United States*, 354 U.S. 298, 333-334 (1957); *United States* v. *Britton*, 108 U.S. 199, 204-205 (1883). As noted above, even when the government is required to prove an overt act in a conspiracy case, the fact that particular overt acts are also substantive crimes does not render the conspiracy and the substantive crimes the "same offense" for double jeopardy purposes. See *United States* v. *Bayer*, 331 U.S. at 542.

Grady did not alter this basic principle of conspiracy law, as this case illustrates. Re-proving the Missouri attempt offense would help to prove the overt act requirement of the conspiracy, but it would not do so standing alone, because it would not establish that the conduct was committed in furtherance of the charged conspiratorial agreement. Proving the elements of the Missouri attempt offense therefore would not "establish" any overt act of the Oklahoma conspiracy. See *Grady*, 110 S. Ct. at 2094.

c. Aside from the court of appeals' mistaken reliance on the overlap in the evidence and allegations in the two indictments, the court fundamentally misapprehended the respective roles of the agreement charged in a conspiracy case and the conduct introduced by the government to prove that agreement.

Borrowing a theory recently adopted by the Second Circuit, the court explained that because the " 'agreement' in nearly all conspiracy prosecutions is not proved directly," but rather is inferred from "evidence of the conspirator's conduct," the conduct in most conspiracy cases "is the focus of the case." Pet. App. 13a (quoting *United States* v. *Calderone*, 917 F.2d 717, 721 (2d Cir. 1990), petition for cert. pending, No. 90-1527). From that proposition, the court concluded, following *Calderone*, that the government may not prosecute for particular conduct and then ask a jury to infer a conspiratorial agreement based on the same conduct. Pet. App. 13a.[9]

The court of appeals' characterization of the substantive conduct, rather than the agreement, as the essence of a conspiracy is at odds with a basic principle of conspiracy law. "The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). Accord *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (agreement "is all but synonymous" with the conspiracy); *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *Pereira* v. *United States*, 347 U.S. 1, 11-12 (1954); *United States* v. *Bayer*, 331 U.S. at 542;

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[9] The Second Circuit has applied *Calderone* in *United States* v. *Gambino*, 920 F.2d 1108 (1990), petitions for cert. pending, Nos. 90-1689 & 91-31. Other courts of appeals have not followed *Calderone's* analysis on this point, but have employed an analysis similar to that of Judge Anderson in dissent below. See *United States* v. *Clark*, 928 F.2d 639, 642 (4th Cir. 1991); *United States* v. *Gonzalez*, 921 F.2d 1530, 1538 n.12 (11th Cir.), cert. denied, No. 90-7857 (Oct. 7, 1991).

Morrison v. *California*, 291 U.S. 82, 92-93 (1934). That is because an agreement to commit illegal acts poses special dangers to society, "independently of any other evil it seeks to accomplish." *Dennis* v. *United States*, 341 U.S. 494, 573 (1951) (Jackson, J., concurring). "Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). Complicity also "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Id.* at 594. Finally, a conspiratorial agreement "is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915).

Although the government in many conspiracy prosecutions asks the jury to infer the agreement from actions taken by the conspirators to advance the goals of the conspiracy, it is the agreement that constitutes the offense. The actions that the government may prove as part of its case are simply evidence of that agreement. Because the court of appeals misapprehended that basic principle of conspiracy law, it erroneously concluded that, after *Grady* v. *Corbin*, a conspiracy and the substantive crimes committed by the conspirators constitute the "same offense" for double jeopardy purposes. Nothing in *Grady* leads to the novel conclusion that the conduct for which a defendant is prosecuted in a conspiracy case consists of the actions he has taken in furtherance of the conspiracy, rather than the act of agreement itself.

Grady therefore does not support the court of appeals' departure from well-settled principles of double jeopardy law as applied to conspiracies and their related substantive offenses.

II. RESPONDENT'S SUBSTANTIVE CONVICTIONS SHOULD NOT BE OVERTURNED MERELY BECAUSE THE SAME EVIDENCE WAS INTRODUCED AT RESPONDENT'S TRIAL ON THE MISSOURI ATTEMPT CHARGE

In addition to reversing respondent's conspiracy conviction, the court of appeals reversed his convictions on five of the substantive counts in the Oklahoma case. None of those counts charged respondent with a conspiracy, and the court's decision with respect to those counts thus does not depend on its analysis of the law of conspiracy. Rather, the court based its reversal of the substantive counts on the fact that evidence of the conduct charged in those counts had been introduced in the Missouri attempt prosecution.

1. It is plain from the indictments filed in this case (see Pet. App. 51a-61a) and in the Missouri case (see Pet. App. 62a-63a) that the court of appeals reversed respondent's convictions on substantive counts that are not in any conventional sense "the same offense" as the one charged in the Missouri case. Counts 2, 3, 4, and 5 of the indictment in this case all charge that respondent manufactured drugs or possessed drugs with intent to distribute them "[o]n or about the 13th day of July, 1987, in the Eastern District of Oklahoma." Pet. App. 55a-57a. Count 6 charges that respondent maintained a place and enclosure for manufacturing drugs "[f]rom on or about June 1, 1987, to on or about July 13, 1987, in the Eastern District of Oklahoma." Pet. App. 57a.

The single count of the Missouri indictment charges an attempt to manufacture drugs "[f]rom on or about August 26, 1987, to on or about August 31, 1987, in Jasper County, in the Western District of Missouri, and elsewhere." Pet. App. 62a.

To convict respondent on Counts 2-6, the jury therefore had to find that he was guilty of offenses in Oklahoma (not Missouri) on or about July 13, 1987 (not late August 1987), or before that time. By contrast, the jury in the Missouri case necessarily found that respondent was guilty of an offense in Missouri and other places (not solely in Oklahoma) in late August 1987 (not on July 13, 1987, or before). In short, the crimes charged in Counts 2-6 of the Oklahoma indictment related to the establishment and operation of the Beggs, Oklahoma, lab, while the crime charged in the Missouri indictment related to the attempt to set up another lab after the Beggs lab was raided. There is no reason why respondent's prosecution for narcotics offenses committed in connection with one lab should bar his prosecution for different offenses committed in connection with another.

2. The court of appeals erred in its analysis of Counts 2-6 because it assumed that, if the government's evidence in two criminal trials overlaps, those trials must be for "the same offense" for purposes of double jeopardy analysis. As pointed out above, that assumption finds no support in the cases of this Court or elsewhere in settled double jeopardy jurisprudence. Indeed, the court of appeals' holding in this case is squarely contrary to the holding of this Court in *Dowling* v. *United States*, *supra*.

As in *Dowling*, respondent was separately tried for two offenses. As in *Dowling*, the government at one of the two trials introduced evidence regarding respondent's conduct in committing the other offense. In both cases, the evidence of the other offense was admitted because it was relevant to the defendant's intent with respect to the offense on trial. In *Dowling*, this Court concluded that the evidentiary overlap created no jeopardy bar to the second trial. In this case, however, the court of appeals ruled that respondent's second trial was barred.

There are two possible distinctions between *Dowling* and this case, but neither supports the court of appeals' ruling. First, in *Dowling* the defendant was acquitted at his first trial, while in this case respondent was convicted in the earlier case. Yet that distinction suggests that this case should follow *a fortiori* from *Dowling*. The defendant's earlier acquittal in *Dowling* at least raised the issue whether the jury in the earlier case had disbelieved the government's evidence and, consequently, whether the government would run afoul of the collateral estoppel doctrine in introducing the same evidence in the defendant's later prosecution. That issue does not arise here, where there is no reason to believe that the jury that convicted respondent in Missouri decided *any* issue in respondent's favor.

Second, in *Dowling* evidence of the first-tried offense was introduced at the trial on the second, while in this case evidence of the second-tried offense was introduced at the trial on the first. That distinction, too, does not suggest any real difference between this case and *Dowling*. The underlying principle applicable to both cases is that the introduction of relevant evidence of particular misconduct is not the same thing as prosecution for that conduct. As Judge Anderson explained in dissent in this case (Pet. App. 29a n.6), any suggestion to the contrary is in-

consistent with this Court's holding in *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988), that a jury may accept similar act evidence if it could "reasonably conclude that the act occurred and that the defendant was [an] actor." That standard is substantially lower than the "beyond a reasonable doubt" standard that governs the jury's finding that a defendant committed the acts charged in a criminal indictment. The introduction of evidence in respondent's Missouri prosecution regarding his earlier activities in Oklahoma therefore did not in any way constitute prosecution for those acts or place him in jeopardy for that conduct. For that reason, the court of appeals was plainly in error when it held that respondent's prosecution on the substantive counts in the Oklahoma indictment was barred by former jeopardy stemming from his prosecution in Missouri for attempt.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 90-1599

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK DENNIS FELIX,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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No. 90-1599

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK DENNIS FELIX,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENT, FRANK DENNIS FELIX

STATEMENT

1. On September 15, 1987, respondent was indicted in the Western District of Missouri for attempting to manufacture methamphetamine between August 26, 1987, and August 31, 1987, in violation of 21 U.S.C. 846. Pet. App. 62a-63a. He was convicted and his conviction was affirmed by the Eighth Circuit, 867 F.2d 1068 (1989).

At respondent's trial on the Missouri indictment, the government introduced evidence that on August 26, 1987, respondent met with George Dwinnells, who owned a firm in Tulsa, Oklahoma, that sold scientific equipment

and supplies. Unbeknownst to respondent, Dwinnells was a DEA informant. At trial, Dwinnells testified that respondent sought to purchase chemicals and equipment needed to make methamphetamine. Respondent made a down payment of $7,500 toward the purchase and gave Dwinnells instructions for securing a trailer to transport the merchandise. In later telephone conversations, respondent increased his order for chemicals and equipment and instructed Dwinnells to deliver the items to a Joplin, Missouri, hotel on August 31, 1987. Dwinnells met respondent at the hotel on the designated date. Respondent was arrested after inspecting the chemicals and equipment and hitching his car to the trailer in which Dwinnells had transported them. 867 F.2d at 1070-1071.

Respondent's defense in the Missouri case was that "he never had criminal intent, but had been acting under the mistaken belief that he was working in a covert DEA operation." 867 F.2d at 1074. Accordingly, the government introduced evidence pursuant to Fed. R. Evid. 404(b) that respondent had been involved earlier in 1987 in manufacturing methamphetamine in Oklahoma. See 867 F.2d at 1072-1073. That evidence showed that during the spring of 1987 respondent had brought chemicals and materials for making methamphetamine from Dwinnells and had furnished those supplies to government witness Paul Roach in exchange for lessons on how to manufacture the drug. Roach testified that he and respondent had used the chemicals and equipment to produce methamphetamine in a trailer near Beggs, Oklahoma. Only July 13, 1987, law enforcement agents seized the unattended trailer, but they did not arrest respondent at that time. 867 F.2d at 1070-1071.

The Eighth Circuit found the evidence concerning the methamphetamine laboratory in Oklahoma to be "highly probative of [respondent's] knowledge and intent," and thus admissible under Rule 404(b). 867 F.2d at 1073.

2. On February 16, 1989, respondent was named in eight counts of an 11-count indictment filed in the Eastern District of Oklahoma. Pet. App. 51a-61a. Count 1 charged that he conspired with five other individuals in the Eastern District of Oklahoma and elsewhere between May 1, 1989 and August 31, 1987, to manufacture, possess, and distribute methamphetamine, in violation of 21 U.S.C. 846. Respondent was named in nine of the 18 overt acts that the indictment charged had been committed "[t]o effect the objects of the conspiracy." Pet. App. 53a. Two of the nine overt acts in which respondent was named took place within the time period of the Missouri indictment. Overt act 17 charged that "[o]n August 26, 1987, [respondent], while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine." Pet.App. 55a. Overt act 18 charged that "[o]n August 31, 1987, [respondent], while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." *Ibid.*

Respondent was also named in seven substantive counts of the Oklahoma indictment. counts 2 through 5 charged that on or about July 13, 1987, in the Eastern District of Oklahoma, respondent had manufactured methamphetamine (Count 2), possessed methamphetamine with intent to distribute it (Count 3), possessed methamphetamine oil with intent to manufacture

methamphetamine (Count 4), and manufactured phenylacetone, a methamphetamine precursor (Count 5), all in violation of 21 U.S.C. 841 (a)(1). Pet.App. 55a-57a. Count 6 charged that, between June 1, 1987, and July 13, 1987, in the Eastern District of Oklahoma, respondent maintained a place and enclosure for manufacturing methamphetamine, in violation of 21 U.S.C. 856. Pet. App. 57a. Counts 9 and 10 charged that, on or about June 21, 1987 (Count 9) and July 13, 1987 (Count 10), Felix traveled from Texas to the Eastern District of Oklahoma with intent to promote the manufacture of methamphetamine and thereafter attempted to promote that activity, in violation of 18 U.S.C. 1952. Pet. App. 59a-60a.

At trial, the government introduced much of the same evidence that had been introduced in the Missouri trial. Respondent was convicted on all counts and sentenced to serve concurrent 20-year terms of imprisonment on Counts 1 through 6 and five-year terms of imprisonment on Counts 9 and 10. The 20-year sentence imposed for the Oklahoma offenses was set to run consecutively to the sentence imposed for respondent's convictions on Counts 1 through 6 of the Oklahoma indictment, and affirmed his convictions on Counts 9 and 10.

3. A divided panel of the Tenth Circuit reversed respondent's convictions on Counts 1 through 6 of the Oklahoma indictment, and affirmed his convictions on Counts 9 and 10.

a. The court held that the conspiracy offense charged in Count 1 was barred by this Court's decision in *Grady v. Corbin*, 110 S.Ct. 2084 (1990). In *Grady*, the Court held that a subsequent prosecution was barred where

"the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 110 S.Ct. at 2093. The court of appeals held that for purposes of applying *Grady* to a conspiracy charge, it is the conduct from which the jury is asked to infer a conspiratorial agreement – rather than the agreement itself – that is considered to be the conduct for which the defendant is prosecuted. Pet. App. 13a. The court then summarized the proof presented in the Missouri trial, as recounted by the Eighth Circuit, and concluded that "[a]s to Count 1, the conspiracy charge, the duplication was extensive." *Id.* at 15a.

The court pointed out that in both trials the government proved the whole course of conduct in which respondent learned to make methamphetamine and set up the Oklahoma lab. Furthermore, in both trials the government proved that, after the raid on the Oklahoma lab, respondent purchased chemicals and equipment for setting up a new lab and took delivery of those materials in Joplin, Missouri. The court noted that respondent's conduct in arranging for the purchase of the materials and taking delivery of them, were listed as overt acts in the Oklahoma conspiracy count. Pet. App. 15a-17a. The court also noted that both the Missouri indictment and the Oklahoma conspiracy count focused on the actions of respondent and Roach, and that both the Missouri and Oklahoma charges alleged conduct that took place outside their respective States. Finally, the court found that "the relevant time frames of the two indictments also overlap." *Id.* at 18a. The court stated that "[t]he Missouri prosecution was premised on conduct that occurred from

the spring of 1987 to August 31, 1987," while the Oklahoma conspiracy count charged conduct that occurred from approximately May 1, 1987, to August 31, 1987. *Ibid.* Based on those facts, the court concluded that the Oklahoma conspiracy count charged "the same conduct for which [respondent] was previously convicted in Missouri" and that prosecution on the Oklahoma conspiracy charge was therefore barred by the Double Jeopardy Clause. *Ibid.*

With respect to the substantive offenses charged in Counts 2 through 6, the court noted that in both trials the government proved that respondent had bought chemicals and equipment to manufacture methamphetamine, that he used those chemicals to produce methamphetamine at the Beggs, Oklahoma, trailer, and that the trailer was subsequently seized by law enforcement authorities. Pet. App. 18a-19a. That evidence was used to show intent in the Missouri trial and as direct evidence of the Oklahoma charges. Because the government relied on the same evidence to prove critical elements of the substantive offenses charged in each case, the court of appeals concluded that respondent's convictions on Counts 2 through 6 had to be reversed. *Id.* at 18a-20a.

Finally, the court affirmed respondent's convictions on Counts 9 and 10, charging interstate travel on June 21 and July 13, 1987, to promote the manufacture of methamphetamine. According to the court, the conduct alleged in those counts was not sufficiently related to the conduct proved in the Missouri trial to require those counts to be dismissed under the Double Jeopardy Clause. Pet. App. 20a-21a.

SUMMARY OF ARGUMENT

I.

While Respondent admits that conspiracy, attempt, and substantive crimes have been treated as separate offenses in the context of a single trial, when the double jeopardy protection against successive trial is implicated separate trials using the same conduct to prove material elements is forbidden under *Grady v. Corbin*, cite 110 S.Ct. 2084 (1990); *Brown v. Ohio*, 431 U.S. 161 (1977) and *Illinois v. Vitale*, 447 U.S. 410 (1980). Cases cited by the Government in its Brief on the merits do not support its contentions to the contrary. *Grady v. Corbin*, requires the result reached by the Tenth Circuit.

II.

The Government mistakenly characterizes this case as one involving Rule 404(b) Fed. Rules Cr. P. evidence relying on *Dowling v. United States*, 110 S.Ct. 668 (1990) and *Huddleston v. United States*, 485 U.S. 681 (1988) which are factually distinguishable. The conduct proved in *Dowling* was a single identification in an unrelated robbery. In this case all the conduct related in Missouri were repeated in Oklahoma under an indictment for that same conduct. In *Felix*, the "duplication was extensive". *U.S. v. Felix*, 926 F.2d 1522, 1528 (1991) and fn. 6 p. 1528 (10th Cir.)

III.

U.S. v. Felix, 926 F.2d 1522 (10th Cir. 1991) and *U.S. v. Calderone*, 917 F.2d 717 (2nd Cir. 1990) were both decided after *Grady v. Corbin, supra*. Both were correctly decided

on the conspiracy counts. *Calderone* represents the correct decision regarding the "Facilitation Counts" in the context of separate trial. The Court should establish the clear rule of *Calderone* that where the conspiracy or substantive counts are barred, proof of which is necessary to the facilitation counts, those facilitation counts are also barred. (Counts 9 and 10, *U.S. v. Felix et al.* Pet. App. 59a., 60a.)

ARGUMENT

I.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution assures an individual that he will not be forced to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. *Abney v. United States*, 431 U.S. 651, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1978). The Double Jeopardy Clause protects an individual against more than being subject to double punishments. It is a guarantee against being twice put to trial for the same offense. See *Abney, supra; United States v. Martin Linen Supply Company*, 430 U.S. 564, 51 L.Ed.2d 642, 97 S.Ct. 1349 (1977); *United States v. Hines*, 689 F.2d 934 (10th Cir. 1982).

In a jury trial, jeopardy attaches when the jury is empaneled and sworn, being an integral part at the Fifth Amendment guarantee against double jeopardy. *United States v. Martin Linen Supply Company, supra; Illinois v. Sommerville*, 410 U.S. 458, 35 L.Ed.2d 425, 93 S.Ct. 1066

(1973). The defendant at that point has a "valued right to have his trial completed by a particular tribunal." *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed.2d 717, 98 S.Ct. 824 at 829 (1978).

> "The bar to retrial following acquittal or conviction ensures that the state does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence."

Ohio v. Johnson, 467 U.S. 493, 81 L.Ed.2d 425, 104 S.Ct. 2536 at 2540 (1984). See *U.S. v. Thompson*, 814 F.2d 1472 (10th Cir. 1987).

When an issue of ultimate fact has once been determined by a valid and final judgment, collateral estoppel dictates that the issue cannot be litigated between the same parties in any future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970). As the Supreme Court has explained in *Brown v. Ohio*, 431 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977). "It has long been understood that separate statutory crimes need not be identical – either in constituent elements or in actual proof – in order to be the same within the meaning of the constitutional prohibition." *Id.* at 2225. In a case where a single defendant is subjected to successive prosecutions, the Double Jeopardy Clause represents "a constitutional policy of finality for the defendant's benefit." *Brown v. Ohio, supra*, citing *United States v. Jorn*, 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547 at 554 (1971). That policy protects the accused from prosecutions involving the relitigation of facts from a prior acquittal, *Ashe v. Swenson, supra*,

and from prosecutions allowing additional punishments after a prior conviction and sentence. *Green v. United States*, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221 at 223 (1957); *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969).

"The right not to be tried more than once and the right not to receive multiple convictions for the same offense are both protected by the Double Jeopardy Clause, but they are conceptually distinct rights." *United States v. Central Liquor Company*, 628 F.2d 1264 at 1266 (10th Cir. 1980). The Supreme Court explains the distinction of applying the Double Jeopardy Clause in cases where factual issues are relitigated in *Brown v. Ohio, supra*.

"The *Blockburger* test, [*Blockburger v. United States*, 283 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932)], is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. Thus in *Ashe v. Swenson, supra*, where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was not present at the robbery, the Court held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims". And in *In Re Nielsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889), the Court held that a conviction of a Mormon on a

charge of cohabitating with his two wives over a 2 1/2-year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period.

"In both cases, strict application of the *Blockburger* test would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. In *Ashe*, separate convictions of the robbery of each victim would have required proof in each case that a different individual had been robbed. See *Ebeling v. Morgan*, 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1151 (1915). In *Nielsen*, conviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the Court in both cases held the separate offenses to be the "same" for purposes of protecting the accused from having to " 'run the gauntlet' a second time." *Ashe, supra* at 1195, quoting from *Green v. United States, supra*, at 225.

Id. at 2226.

The Government argues in its Brief on the merits that "Conspiracy and a related substantive crime are not the 'same offense' for purposes of the Double Jeopardy Clause" (pp. 12 through 15). As a general rule, within the context of a single trial, this is the case. However, under the teachings of *Brown v. Ohio, supra*, and *Grady v. Corbin, supra*, where proof of the same conduct proves a material issue in each case, no decision has been reached by the Court. The Government's Brief, p. 14, states: "And it is not unusual for the two charges to be brought in separate

prosecutions, particularly where, as in this case, the conduct pertaining to each offense was based in different jurisdictions." The citations at pages 12 and 13 and in footnote three, page 14 of the government's brief do not support his conclusion, and require some discussion.

Blockburger v. United States, 284 U.S. 299 (1932) holds, in the context of a single trial, that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. Even this case has been converted to analysis of the *statutes* involved to determine if either contains an *element* that the other does not. *Brown v. Ohio, supra.*

Most of the cases cited involve single trials for conspiratorial and substantive conduct. *United States v. Feola*, 420 U.S. 671 (1975) (conspiracy and assault on Federal narcotics officers, single trial); *Callanan v. United States*, 364 U.S. 587 (1961) (single trial, separate and cumulative punishments for obstructing interstate commerce by extortion and conspiracy to do so); *Pinkerton v. United States*, 328 U.S. 640 (1946) (single trial, multiple punishments for conspiracy and substantive offense – primarily significant for abolishing once and for all the concept of merger); *Iannelli v. United States*, 420 U.S. 773 (1985) (Single trial for RICO conspiracy and substantive gambling counts).

Garrett v. United States, 471 U.S. 773 (1985) involves violations of 21 U.S.C. § 848, Continuing Criminal Enterprise, where facts are offered to prove one of three

predicate offenses that must be shown to make out a CCE violation. The *Garrett* case involves a more complicated statutory scheme than is involved in this case, and the Court has accepted for argument the case of *United States v. Gambino*, 920 F.2d 1108 (2d Cir. 1990), U.S. Supreme Court No. 91-31, 49 CrL 3099. However, in *United States v. Russo, et al.*, 906 F.2d 77 (2d Cir. 1990), the government conceded double jeopardy violation under *Grady v. Corbin* under similar facts. "In its letter brief, the government conceded that prosecution of the obstruction of justice charges in the Southern District following acquittal of the RICO conspiracy in the Eastern District was inconsistent with the 'conduct' test announced in *Grady*." *Id.* at 78.

The case of *United States v. Bayer*, 331 U.S. 532 (1947), is inapplicable to the situation of successive trials in the double jeopardy context for two reasons. First, military courts martial are subject only to limited review by civilian courts. See *Carter v. McClaughry*, 183 U.S. 365 (1902), discussed at further length *infra*. Secondly, under its facts, *Bayer* has been overruled, *sub nom*, by *McNally v. United States*, 107 S.Ct. 2875 (1987).

In *United States v. Marden*, 872 F.2d 123 (5th Cir. 1989), the defendant Marden was indicted in Florida on four counts as follows: "[C]onspiring to import in violation of 21 U.S.C. §§ 952 and 963 (Count 1); attempting to import in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 952 and 963 (Count 2); conspiring to possess with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 3); and possessing illicit drugs on board a vessel within the customs waters of the United States, with intent to distribute, in violation of 21 U.S.C. §§ 955a(c), 19 U.S.C. § 1401(j), and 18 U.S.C. § 2 (Count 4)". *Ibid.* At 124. A later

indictment in Louisiana charged conspiracies under the same statutes for an importation into that state and two substantive counts involving an importation, substantially identical to the Florida indictment. Marden was convicted in Federal Court in Florida on the conspiracy charges (Counts 1 and 3) and acquitted on the substantive counts (Counts 2 and 4). *Ibid.* at 124.

> "Marden then filed a pretrial motion to dismiss the Louisiana indictment on double jeopardy grounds. *The government agreed* to the dismissal of the conspiracy charges (Counts 1 and 3), but opposed the dismissal of the substantive counts (Counts 2 and 4). The Louisiana district court dismissed Counts 1 and 3, but denied Marden's motion to dismiss Counts 2 and 4, finding he had never been put in jeopardy for the substantive counts of the Louisiana indictment. The court stayed Marden's trial on these two counts pending resolution of the issue by this court, which has jurisdiction to review the denial of a motion to dismiss based on double jeopardy grounds under *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 2040, 52 L.Ed. 651 (1977).
>
> *Ibid.* at 124-125.

The Fifth Circuit decided the case against Marden on a *Blockburger* analysis, citing *United States v. Anderson*, 651 F.2d 375 (5th Cir. 1981), and denied Marden's double jeopardy motion on the substantive counts of attempt and possession in Louisiana. *Marden*, supra, at 126. The history of the case ends with this opinion, and the outcome, whether by jury verdict or guilty plea is unknown to this author.

However, the *Marden* case was decided in April 1989, more than a year before *Grady v. Corbin, supra*, and sheds no light on what conduct was used in Florida to prove the conspiracies.

The remaining cases cited by the Government are *single trial cases involving double punishments*. *United States v. Anderson*, 651 F.2d 375 (5th Cir. 1981) (Conspiracy to import and attempt); *Brinkley v. United States*, 560 F.2d 871 (8th Cir. 1977) cert. denied, 98 S.Ct. 435 (1977) (Conspiracy and attempted bank robbery); *United States v. McQuisten*, 795 F.2d 858 (9th Cir. 1986) (single trial convictions among others for Conspiracy and attempt to manufacture methamphetamines, *all sentences concurrent*). The remaining two cases are discussed at length below.

In *United States v. Touw*, 769 F.2d 571 (9th Cir. 1985) the court laid down its rule on multiple punishments for attempt and conspiracy:

> "Here, appellants engaged in a single act when they attempted to purchase marijuana from DEA agents. The government properly charged them with both conspiracy and attempt, but if convicted on both counts, the court may punish them on only one count." *Id.* at 574.

The issue of separate punishments for the separate offenses of attempt and conspiracy was addressed by the 10th circuit in *United States v. Savaiano*, 843 F.2d .1280 (10th Cir. 1980). In *Savaiano*, the defendants were convicted of conspiracy to manufacture amphatamines and attempt to manufacture amphatamines, and separate sentences for the dual convictions were upheld by the court. The instant case can be distinguished from *Savaiano* in two fundamental areas.

First, the appellants in *Savaiano* were tried and convicted of the offenses in a single trial in Federal Court. *Id.*, at 1280. Appellant Felix was subjected to two separate trials in two separate jurisdictions, the Western District of Missouri and the Eastern District of Oklahoma.

Second, while it relied on the reasoning in *Blockburger v. United States, supra,* to uphold the separate convictions the Tenth circuit noted:

> "We rely on the sound discretion of sentencing judges to ameliorate, in appropriate cases, the potential injustice or harshness of multiple sentences arising from a single course of conduct or transaction. That discretion was exercised in this case when the district court caused the separate sentences to run concurrently."

United States v. Savaiano, supra, at 1293. In the instant case, Appellant Felix was not only placed in jeopardy twice for the offenses from a single transaction, he was twice convicted and sentenced to consecutive prison terms.

Since Felix was tried in two separate trials, and the sentences were made consecutive in the second trial, we are left merely to speculate what the trial judge in Missouri (first trial) or in Oklahoma (second trial) would have done had all offenses been before him at trial.

The Tenth Circuit has acknowledged the problems associated with strict application of the *Blockburger* test in cases involving multiple prosecutions of offenses arising out of a single course of conduct or transaction. In *Tucker v. Makowski,* 883 F.2d 877 (10th Cir. 1989), the petitioner appealed the denial of a writ of habeas corpus challenging his state convictions in successive prosecutions for

offenses arising from the same criminal transaction. *Id.*, at 878. The Tenth Circuit noted:

> On appeal, petitioner relies in part on *Jordan v. Virginia,* 653 F.2d 870, 873 (4th Cir. 1980), to argue that the *Blockburger* test does not apply where successive prosecutions are involved. We disagree with the Fourth circuit to the extent that the court has suggested that the *Blockburger* test does not ordinarily apply to double jeopardy challenges to successive prosecutions. . . .
>
> We do agree, however, that successive prosecutions implicate "the protection against re-trial itself." *Jordan,* 653 F.2d at 873. This component of double jeopardy, "insures that having once 'run the gauntlet' of criminal trial to judgment either of conviction or acquittal, a person shall not be required to run essentially the same gauntlet again." *Id.*, . . . Because this important interest is at stake, the *Blockburger* test's examination of the requisite statutory elements must be made "from the vantage point of the particular case before the court."

Id. at 879.

In the instant case, the appellant has previously been placed in jeopardy, in that the offenses charged against him in the Western District of Missouri arose out of the same transactions and constitute the same elements as the indictment from the Eastern District of Oklahoma, both of which led to a finding of guilty by a jury and a prison sentence by a court.

In order to avoid the strictures placed on the Government by the Double Jeopardy Clause and *Grady v. Corbin,*

supra, the government argues that "In this case, by contrast [to *Grady*], reproving the elements of the Missouri attempt offense would not establish the Oklahoma conspiracy offense or any essential element of that offense." Government's Brief on the Merits p. 20.

> "Although respondent's conduct in connection with the Missouri attempt provided evidence of the nature and extent of the conspiratorial agreement, the agreement was not itself established by the evidence of respondent's Missouri conduct. The jury could have convicted respondent of the conspiracy count even if it disbelieved all the evidence concerning respondent's Missouri conduct, and it could have acquitted him of the conspiracy even if it had found that he committed the crime of attempt in Missouri." United States' Brief on the Merits, p. 21.

Having been deprived of his valuable right to place all the conduct before one trial jury, Felix will never know.

This argument ignores the plain language of the Eighth Circuit opinion stating that:

> "Felix was indicted for knowingly and intentionally attempting to manufacture methamphetamine. 'Where specific intent and guilty knowledge are elements of the crime charged, evidence of related criminal activity *tending to establish those elements* is generally admissible.' *United States v. Gocke*, 507 F.2d 820, 824 (8th Cir. 1974, cert. denied, 420 U.S. 979 (1975) . . . (additional citations omitted). More specifically, we have repeatedly held that evidence of similar prior drug activity is *admissible in drug prosecution cases because a defendant's complicity in other*

> *similar transactions serves to establish intent or motive to commit the offense charged.* (citations omitted) (emphasis supplied). . . . The evidence linking Felix to the Beggs lab supported the Government's case that Felix had the requisite knowledge and intent to make methamphetamine. This evidence showed Felix learning how to cook methamphetamine, developing a relationship with a supplier of methamphetamine-making chemicals and equipment, and ordering explosives for his future lab. In short, *the evidence was relevant to a material issue. United States v. Felix*, 867 F.2d 1068 at 1072 (8th Cir. 1989). (Emphasis supplied).

In the Missouri trial, Felix relied on the defense of entrapment, and the only issue to be decided was whether or not Felix possessed the requisite intent to commit the crime, and appellant was required to admit the physical acts required under the statute charged. *Id.* at 1074. The Government's argument that the court's limiting instruction preventing use by the jury of the Beggs Oklahoma lab evidence to prove physical acts in the Missouri jurisdiction saves the evidence for later prosecution is fatuous. In order to raise an entrapment defense it is necessary to admit the physical acts, and they presented no contested issue for the jury's determination. The *only issue* before the Missouri jury was *intent and knowledge*, and the *only evidence used to prove that material element* was the evidence of the Beggs lab and related transactions subsequently prosecuted in Muskogee, and the subject of this appeal.

The government contends in its brief that:

"The overlap in proof between the two cases does not establish a violation of the Double Jeopardy Clause. Indeed, if *Grady* is interpreted to foreclose prosecution for an offense simply because evidence of the commission of that offense was relevant to a prosecution for a different crime, the double jeopardy rule of *Grady* will have been converted into the 'same evidence' test. In that event, to avoid the bar of double jeopardy the government will have to avoid any reference in one prosecution to acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution. The Court in *Grady* disclaimed any intention to create such a rule, see 110 S.Ct. 2093 & n. 12, and such a rule, if adopted, would fly in the face of almost 100 years of this Court's precedents." Government's brief on the merits p. 21-22.

The cases cited in the Government's brief do not support this proposition. *Gavieres v. United States*, 220 U.S. 338 (1910), where a Philippine citizen was twice convicted for the same conduct in two different courts of the Philippine Islands would not survive the test of *North Carolina v. Pearce* 89 S.Ct. 2072, 2089 (1969), nor *Grady v. Corbin, supra*.

> It is urged that that case is different because there were two different crimes with different punishments provided by statute for each one. That, however, is a matter of semantics. 'It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different

> punishments for the same crime.' *People v. Henderson*, 60 Cal. 2d 482, 479, 35 Cal. Rptr. 77, 86, 386 P.2d 677, 686 (1963) (Traynor, J.)"
>
> *North Carolina v. Pearce*, supra, 2089 (Concurring opinion).

In *Burton v. United States*, 202 U.S. 344 (1905), a U.S. Senator was convicted of agreeing to receive and receiving compensation for representing the Rialto Grain and Securities Company in violation of Sec. 1782 of the Revised Statutes. The Court stated:

> "The plaintiff in error was indicted in the Circuit Court of the United States for the Eastern District of Missouri for a violation of section 1782, the offense being alleged to have been committed at St. Louis. The accused was found guilty, and on writ of error *the judgment was reversed by this court* and a new trial ordered upon the ground, among others, that according to the facts disclosed in that case the offense charged was not committed in the State of Missouri where the accused was tried *Burton v. United States*, 196 U.S. 283.
>
> Subsequently, the defendant was tried under a new indictment (the present one) charging him with certain violations of section 1782. The new indictment contained eight counts."

Burton, supra, 202 U.S. 344 at 360.

Furthermore, the Court stated:

> "He was then arraigned, tried and found guilty on the first, second, third, sixth, seventh and eighth counts. No judgment or sentence was pronounced on the first second and eighth counts, *because they covered the transaction and*

> *offense mentioned in the sixth count.* And *as the third count covered the transaction and offense embraced by the seventh count, no judgment or sentence was pronounced on it.*
>
> *Id.* at 361 (emphasis supplied).

Burton, therefore, stands for the proposition that retrial after a reversal at the appellate level does not implicate double jeopardy protections, and the quotation cited by the Government concerns a single trial where two distinct offenses derive from the same statute. Burton was punished only for one count.

Carter v. McClaughry, 183 U.S. 365 (1902) is the review of a military court martial, where one trial was had and multiple punishments rendered. "The contention that an officer convicted of crimes punishable in the penitentiary under Articles 60 and 97 cannot be so punished if he be also dismissed, or cannot be dismissed if he be so punished, is too unreasonable to be countenanced." *Ibid.* at 396. In conclusion, the court stated:

> "But we must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of the courts martial, when affirmed by the military tribunal of last resort, *cannot be revised by the civil courts* save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed. *Ibid.* at 401.

Kepner v. United States, 195 U.S. 100 (1904), cited at fn. 7, page 22 of the Government's Brief on the merits, involves a unique fact situation where the court barred a second trial after acquittal in the Philippine Islands, even

where the Government was given the temporary statutory right to appeal trial acquittals.

> "The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense, if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well settled sense as declared and settled by the decisions of this court.
>
> "It follows that military order No. 58, as amended by act of the Philippine Commission, No. 194, in so far as it undertakes to permit an appeal by the government after acquittal, was repealed by the act of Congress of July, 1902, providing immunity from second jeopardy for the same criminal offense.
>
> "This conclusion renders it unnecessary to consider, if the question was presented in this case, whether the accused was entitled to the right of a trial by jury.
>
> Judgment reversed and prisoner discharged."
>
> *Ibid.* 133-134.

In its brief of this proposition, the government ignores *In Re Neilson*, 133 U.S. 176 (1889) (later mentioned in Government's Brief on the Merits, page 19, in connection with another argument). Neilsen's petition for habeas corpus was ordered granted by the Supreme Court where it was shown the petitioner was convicted in

the Territory of Utah first for bigamy and in a separate trial, for adultery, after he had completed his sentence for bigamy. "[W]here, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *Id.* at 188. Cited with approval in *Brown v. Ohio*, 97 S.Ct. 2221, 2227 (1977). The idea that *Grady v. Corbin*, infra, upsets one hundred years of jurisprudence is without basis in fact or precedent.

Grady v. Corbin, 110 S.Ct. 2084 (1990), set forth clearly for the first time the proposition that the Fifth Amendment to the United States Constitution "bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 2093.

In *Grady v. Corbin, supra*, one Thomas Corbin was involved in a traffic crash that caused one death and injured another. He was issued traffic citations for misdemeanor D.W.I. and failure to keep right of the median. Corbin pled guilty in Town Justice Court and was sentenced to probation and a fine. *Id.*, at 2089. Two months after the sentences in the misdemeanor cases, a grand jury indicted Corbin for "reckless manslaughter, second degree vehicular manslaughter, and criminally negligent homicide for causing the death of Brenda Dirago; third degree reckless assault for causing physical injury to David Dirago; and driving while intoxicated." *Id.*, at 2089.

Corbin's attorney sought a Writ of Prohibition which was denied by the New York Appellate Division which was reversed by the New York Court of Appeals.

> "The court [New York Court of Appeals] prohibited prosecution of the driving while intoxicated counts pursuant to New York's statutory double jeopardy provision, N.Y. Crim.Proc.Law § 40.20 (McKinney 1971 and Supp. 1970-1989). The Court further ruled that prosecution of the two vehicular manslaughter counts would violate the Double Jeopardy Clause of the Fifth Amendment pursuant to the *Blockburger* test because as a matter of state law, driving while intoxicated 'is unquestionably a lesser included offense of second degree vehicular manslaughter.' 74 N.Y.2d, at 290 and n.7, 543 N.E.2d at 720, and n.7. Finally, relying on the 'pointed dictum' in this court's opinion in *Vitale* [*Illinois v. Vitale*, 447 U.S. 410 (1980)], the court barred prosecution of the remaining counts because the bill of particulars expressed an intention to 'rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges.' " *Id.* at 2092.

In affirming the New York Court of Appeals, Mr. Justice Brennan wrote:

> "These cases all recognized that a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials. This case similarly demonstrates the limitations of the *Blockburger* analysis. If *Blockburger* constituted the entire double jeopardy inquiry in the context of successive prosecution, the State could try Corbin in four consecutive trials:

for failure to keep right of the median, for driving while intoxicated, for assault, and for homicide. Tr. of Oral Arg. 17-18. The State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, which opening and closing arguments most persuaded the jurors. Corbin would be forced either to context each of these trials or to plead guilty to avoid the harassment and expense.

Thus, a subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in *Vitale*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. See *Dowling v. United States*, 493 U.S. ___, 110 S.Ct. 558 (1990). On the other hand, a State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct."

Id. at 2093.

The Government admits, in its Petition for Certiorari, that the identical evidence was used to produce convictions in two separate jury trials in two separate *federal* jurisdictions for the same conduct. Petition for Certiorari, pages 2 through 9 entitled "Statement", and in its Brief on the Merits, page 19: "That is, a second prosecution is not barred simply because the government proves the second offense by relying on the same evidence that it used to prove the first offense."

By a plain reading of the opinions in the two "Felix Trials", it is clear that (1) the conduct presented at both trials is identical, (*United States v. Felix*, 926 F.2d 1522, 1529 (10th Cir. 1991), [citing *United States v. Felix*, 867 F.2d 1068, 1070-71 (8th Cir. 1989)]; (2) no *new evidence* was developed between the trials or presented at the second trial; (3) the *conduct* presented in the first trial to support the *essential element of intent and 'substantial step' requirements for conviction* was used in the second trial to prove *substantive offenses*, indicted in Oklahoma as Counts 1 through 6, *U.S. v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991); (4) the government admitted at trial that the "Possession of chemicals and equipment necessary to the manufacture of methamphetamine, overt acts 17, and 18 in the present indictment, (Oklahoma) (Felix II), was the activity leading to defendant's conviction for attempted manufacture in the Western District of Missouri", and should not be permitted to argue to the contrary in this high Court. *United States v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991). The offenses of *conspiracy and attempt* to violate Section 841(a)(1) of Title 21 U.S.C.A., while not identical, and may subject a defendant trial and punishment for both in the context of a single trial, may not be tried in

subsequent trials where they were subject to the proof of the same conduct. *Grady v. Corbin, supra.*

The guarantee of the Fifth Amendment (Double Jeopardy Clause) protects against "a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), *Brown v. Ohio*, 97 S.Ct. 2221, 2225 (1977).

III.

The Government's Brief on the Merits in this case mistakenly focuses on the dissent by Judge Anderson, *United States v. Felix*, 926 F.2d 1522 (10th Cir. 1991), and on the case of *Dowling v. United States*, 110 S.Ct. 668 (1990), decided before *Grady v. Corbin*, and dealing with Rule 404(b) evidence. In *Dowling*, evidence of an identification in an unrelated robbery was allowed, even though the defendant had been acquitted, where *"the prior acquittal did not determine an ultimate issue in the present case."* *Dowling v. U.S.*, 110 S.Ct. 668, 672 (1990). Furthermore, the *Dowling* opinion states that "[t]he prosecutor then contended that Dowling had not disputed identity, but rather had claimed that a robbery had not taken place because he and Christian allegedly 'merely came to retrieve . . . money from an individual in the house.' " *Id.* at 674. The court concluded that Dowling's first acquittal could have resulted from "any number of possible explanations" *Id.* It is apparent from the decision below in both Felix appeals that that is not the case here.

Felix contested the evidence against him in both cases, and the evidence of the Oklahoma lab and "prior bad acts" was admitted because it was "relevant to *a material issue* and its probative value . . . [was not] . . . substantially outweighed by the danger it presents of unfair prejudice." *U.S. v. Felix*, 867 F.2d 1068, 1972 (8th Cir. 1989). The Eighth Circuit found such conduct "highly probative of knowledge and intent, which were elements of the crime with which he was charged." *Id.* at 1073.

In addition, there is a crucial element in this case and in *Grady v. Corbin*, which is absent from the *Dowling* case. *There is a continuing course of related events* from the spring of 1987 through Felix's arrest in the fall of 1987. Grady was prosecuted for a *related series of events* over a shorter period of time. In *Dowling*, there is nothing to indicate that the conduct offered in both trials was in any way related to an ongoing scheme.

Likewise, reliance on *Huddleston v. United States*, 485 U.S. 681 (1988) is also misplaced. What the Government's brief fails to acknowledge is that whereas Felix was subsequently prosecuted for this same conduct, there is no record that Huddleston was so prosecuted, and *Grady v. Corbin* would mandate the same result in a subsequent trial of Huddleston for the "similar act evidence". Government's Brief on the Merits, page 30.

The case of *United States v. Calderone*, 917 F.2d 717 (2nd Cir. 1990), denigrated in the government's brief on the merits at p. 25, is directly on point in this case, and correctly decided. There, the government carved a smaller conspiracy out of a larger conspiracy for which

the defendant was acquitted. Here, the government charged in Oklahoma a larger conspiracy out of facts proved in Missouri to support the intent requirement and the substantial step requirement of a prosecution for attempt. In *Calderone*, the Second Circuit treats the substantive offenses differently than the Tenth Circuit did in this case. "The 'same conduct' test likewise bars prosecution of the substantive telephone and heroin distribution counts. Although Calderone and Catalano were not charged with these specific crimes in *Adamita*, they were nonetheless prosecuted for the *conduct* that supports these offenses. And under *Grady*, they may not again be prosecuted for this conduct, even though the charges are brought under different criminal statutes." *Calderone, supra*, at 722. The Tenth Circuit declined to adopt the rule in *Calderone* concerning the two travel counts (9 and 10) of the Oklahoma indictment. *U.S. v. Felix*, 926 F.2d 1522, 1531 (10th Cir. 1991) stating:

> "At first glance, the remaining counts: 9 and 10 (interstate travel to promote manufacturing) seem akin to the telephone counts also barred in *Calderone*. Arguably, they also 'allege[ ] as an element the facilitation of the conspiracy charged in count one' 917 F.2d at 726 (Newman, J., concurring). We are not, however, inclined to go so far on the record before this Court.
>
> *Ibid.* footnote 8, p. 1531.
>
> "Where successive prosecutions are at stake, the guarantee (of the Fifth Amendment Double Jeopardy Clause) serves 'a constitutional policy of finality for the defendant's benefit.' *United States v. Jorn*, 400 U.S. 570, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (plurality opinion). That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, see *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); cf. *United States v. Martin Linen Supply Co.*, 430 U.S. 5674, 97 S.Ct. 1347, 51 L.Ed.2d 642 (1977), and from attempts after a prior conviction and sentence, see *Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); cf. *North Carolina v. Pearce, supra*."
>
> *Brown v. Ohio*. 97 S.Ct. 2221, 2225 (1977).

The Government has the ability to draft indictments in any manner they chose. What *Grady v. Corbin* teaches is that there are limitations on that power. The government could just as easily have tried the conspiracy in Missouri during the first trial, since elements of the conspiracy occurred in that venue. Fed. R. Crim. Proc. 8(a).

Respondent contends that *Grady v. Corbin, supra*, mandates that this court reverse the trial court's ruling on Appellant's Motion to Dismiss on Grounds of Double Jeopardy. Where, as here, the government used the identical witnesses, the identical physical evidence and convicted on charges for which the respondent had previously been convicted. See *United States v. Felix*, 867 F.2d 1068 (8th Cir. 1989). If the Oklahoma and Missouri cases had been tried in reverse order, and Felix had been tried and sentenced in Oklahoma, there is no doubt that the Missouri trial would have been barred by *Grady v. Corbin, supra*. Where as here, the government chooses to proceed on the small fragment of the larger course of conduct, the same outcome must result. We believe the correct decision was reached in the Second Circuit case and urge that result in this case under the inherent power

of the Court to correct plain error not among the questions presented but evident from the record. Supreme Court Rule 24.1(a).

> "This conclusion merely restates what has been this Court's understanding of the Double Jeopardy clause at least since *In Re Neilson* was decided in 1889. In that case the Court endorsed the rule that
>
> > 'where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.' 131 U.S., at 188, 9 S.Ct., at 676.
> >
> > Although in this formulation the conviction of the greater precedes the conviction of the lesser, the opinion makes it clear that the sequence is immaterial." *Brown v. Ohio*, 97 S.Ct. 2221, 2227 (1977).

While *Brown v. Ohio* dealt with joy riding and auto theft as lesser and greater included offenses for the purposes of double jeopardy, that case could have been decided just as *Grady v. Corbin* where joyriding acts would be used to prove the unlawful possession element of the theft case.

> "An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. (citations omitted) *Brown v. Ohio*, 97 S.Ct. 2221, footnote 7 at p. 2227 (1977).

No such exception exists in this case, as it is clear that the Government merely presented the same evidence at the Oklahoma trial and the Missouri trial. *U.S. v. Felix*, 926 F.2d 1522, 1529-1531 (10th Cir. 1991).

Appellee agrees with Mr. Justice Scalia's comments in his dissenting opinion in *Grady v. Corbin* that "its [the decisions] practical effect, whenever it applies, will come down to a requirement that where the charges arise from " 'a single criminal act, occurrence, episode, or transaction,' " they "must be tried in a single proceeding." (citation omitted) *Id.* at 2102. Mr. Justice Brennan, the author of the *Grady* opinion, long strove for this rule in many dissenting opinions. See *Thompson v. Oklahoma*, 429 U.S. 1053, 97 S.Ct. 768, 50 L.Ed. 2d 770 (Dissenting from denial of certiorari) (1977). Without such a rule,

> "The State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, which opening and closing arguments most persuaded the jurors. Corbin would be forced either to contest each of these trials or to plead guilty to avoid the harassment and expense." *Grady v. Corbin*, 110 S.Ct. 2084, at 2093 (1990).

Only such a rule of law can avoid the evils forbidden by the Double Jeopardy clause of the Fifth Amendment and restore the respect of the bench and bar for the rule of law.

CONCLUSION

The Double Jeopardy Clause of the Fifth Amendment prohibits the successive prosecutions suffered by Appellee Felix. The decision of the Tenth Circuit should be reformed to reverse Appellee's convictions on Counts 9 and 10 of the Oklahoma conviction, and as reformed, should be affirmed.

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Supreme Court, U.S.
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No. 90-1599

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DENNIS FELIX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent argues for applying the "same transaction" test to determine whether successive prosecutions violate the Double Jeopardy Clause. He contends that "[o]nly [a requirement that all criminal charges arising from the same transaction be tried in a single proceeding] can avoid the evils forbidden by the Double Jeopardy clause of the Fifth Amendment." Br. 33. That position accurately states the implicit premise and necessary result of the Tenth Circuit's decision in this case. This Court, however, has repeatedly declined to adopt a "same transaction" test. See, *e.g.*, *Garrett* v. *United States*, 471 U.S. 773, 790 (1985). Most recently, in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), the case upon which respondent principally relies, the Court disclaimed any intention to adopt a "same evidence" or "same trans-

action" test. See *id.* at 2093 & n.12, 2094 n.15. Respondent's argument, and the Tenth Circuit's decision that respondent defends, are thus based on a theory of double jeopardy that this Court has consistently rejected.

2. In our opening brief (at 12-15), we explained that, under well-settled principles of the law of conspiracy, prosecution for a substantive offense and for a conspiracy to commit that offense are separate offenses and may be separately prosecuted. See *United States* v. *Bayer*, 331 U.S. 532, 542 (1947). Although respondent disputes that point (Br. 11-15), he does not cite any case in which a conspiracy prosecution was barred simply because the defendant had been separately prosecuted for one of the objects of the conspiracy. To the contrary, numerous lower courts, as well as this Court in *Bayer*, have affirmed convictions over the defendant's claim that his separate prosecution for conspiracy and for a substantive offense violated the Double Jeopardy Clause. See, *e.g.*, *United States* v. *Guthrie*, 789 F.2d 356, 358 (5th Cir. 1986); *United States* v. *Hines*, 713 F.2d 584, 586 (10th Cir. 1983); *United States* v. *Snell*, 627 F.2d 186, 188 (9th Cir. 1980), cert. denied, 450 U.S. 957 (1981); *United States* v. *Brown*, 604 F.2d 557, 559 (8th Cir. 1979); *United States* v. *Bosch*, 584 F.2d 1113, 1118-1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 919 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Ricco*, 549 F.2d 264, 273 (2d Cir.), cert. denied, 431 U.S. 905 (1977).

Respondent challenges our reliance on *Bayer*, asserting (Br. 13) that *Bayer* has been overruled by *McNally* v. *United States*, 483 U.S. 350 (1987). This Court's opinion in *McNally*, however, did not discuss or even cite *Bayer*. *McNally* rejected an "intangible rights" theory of prosecution under the mail fraud statute, 18 U.S.C. 1341; it did not decide the quite different question whether the "intangible rights" theory is valid under the federal conspiracy statute, the statute at issue in *Bayer*. See *McNally*, 483 U.S. at 358-359 n.8. More importantly, because *McNally* raised no issue concerning the scope of the Double Jeopardy Clause or the validity of successive prosecutions for conspiracy and substantive offenses, *McNally* in no way questioned *Bayer*'s holdings with regard to those issues.

3. Respondent asserts that "the only evidence used to prove" intent in the Missouri trial was "the evidence of the Beggs lab and related transactions subsequently prosecuted in Muskogee, and the subject of this appeal." Br. 19 (emphasis omitted). Respondent also states that "the conduct presented at both trials is identical," Br. 27, that "no *new evidence* was developed between the trials or presented at the second trial," *ibid.*, and that "the government used the identical witnesses [and] the identical physical evidence" in both prosecutions, Br. 31.

The record of the two cases refutes respondent's assertions. The transcript of the evidence presented at the three-day Missouri trial—excluding opening and closing statements and jury instructions—takes up approximately 430 pages.[1] Approximately 28 of those 430 pages were devoted to the government's examination of witnesses concerning the Beggs, Oklahoma, methamphetamine lab. Similarly, the transcript of the evidence presented at the five-day Oklahoma trial—with the same exclusions—takes up approximately 900 transcript pages. Approximately 20 of

[1] We have lodged a copy of the transcript of the Missouri trial with the Court.

those 900 pages were devoted to the government's examination of witnesses concerning respondent's conduct in late August in attempting to set up the Missouri methamphetamine lab. Ten witnesses testified for the government at the Missouri trial. Only four of those were among the 15 witnesses who testified for the government at the Oklahoma trial. Thus, contrary to respondent's suggestion, the bulk of the government's proof at the Missouri trial did not concern the Oklahoma lab, and the bulk of the government's proof at the Oklahoma trial did not concern the Missouri attempt.

4. In our opening brief (at 16-20), we explained that *Grady* v. *Corbin* followed and relied on this Court's earlier decisions in *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980). Under *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), two crimes do not constitute the same offense within the meaning of the Double Jeopardy Clause if conviction of each requires proof of a fact not required for conviction of the others. *Grady*, *Harris*, and *Vitale* establish an exception to the strict application of the *Blockburger* test in a narrow range of cases. Thus, even if the second offense could theoretically be established without re-proving the first offense, successive prosecutions may be barred if the government will have to re-prove the first offense in order to prove the second. Cf. *Whalen* v. *United States*, 445 U.S. 684 (1980).

In our view, that is all *Grady* v. *Corbin* stands for. The basic double jeopardy issue in a successive prosecution case is whether the defendant has been twice prosecuted for "the same offense." Neither before *Grady* nor afterwards is it sufficient that the two prosecutions involved the "same evidence," the

"same transactions," or even the "same act or course of conduct." If the two prosecutions are not for the same criminal offense, it is irrelevant that the proof overlaps or the conduct that is the subject of the two separate prosecutions is largely or entirely the same.

Respondent argues (Br. 23-24) that our analysis is inconsistent with *In re Nielsen*, 131 U.S. 176 (1889). Contrary to respondent's contention, the decision in that case is consistent with conventional double jeopardy analysis, as later expressed in the *Blockburger* test. Indeed, the Court in *Nielsen* made precisely the point that Judge Anderson made in dissent in this case concerning the distinction between proof of the same conduct and proof of the same offense: "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence." *Nielsen*, 131 U.S. at 188.

The defendant in *Nielsen* was first charged with cohabitation, based on the allegation that he had lived as man and wife with two women continuously for several years. After he pleaded guilty to the cohabitation charge, the government sought to prosecute him for committing adultery with one of the two women. 131 U.S. at 177. The Court held the second prosecution barred by the Double Jeopardy Clause.

The Court in *Nielsen* treated the question before it as whether the offense of adultery was entirely encompassed within the offense of cohabitation, as defined in an 1882 federal statute directed at prohibiting polygamy. As the governing test, the Court adopted the formulation set forth in *Morey* v. *Commonwealth*, 108 Mass. 433, 435 (1871), which is exactly the same formulation that the Court later adopted in *Blockburger*: "A single act may be an offence against two statutes; and if each statute requires proof of

an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Nielsen*, 131 U.S. at 188, quoting *Morey*, 108 Mass. at 434. The Court then set about to demonstrate that the crime of adultery was not a separate offense from the crime of cohabitation under that test; that is, the Court proceeded to demonstrate that, in its view, adultery was a lesser included offense of cohabitation. While the Court's analysis in reaching that conclusion is somewhat obscure and may be questionable as a matter of statutory construction, what is clear is that the double jeopardy principle the Court applied was the traditional *Morey-Blockburger* test for determining whether two statutory crimes constitute the same offense and therefore may be the subject of successive prosecutions.

The Court explained that Nielsen would be entitled to relief "if the crime of adultery with which he was charged was included in the crime of unlawful cohabitation for which he was convicted and punished," that is, "if the adultery was only a part of, and incident to [the cohabitation]." 131 U.S. at 185. The Court concluded that it had "no doubt" that "the adultery charged in the second indictment was an incident and part of the unlawful cohabitation." *Id.* at 186-187. In order to reach that conclusion, the Court had to overcome the problem that, on its face, adultery appeared to have two elements that were not included within the crime of cohabitation: (1) that the parties to the adultery engaged in sexual intercourse; and (2) that one of the parties to the adultery was married.

The Court overcame the first obstacle by holding that unlawful cohabitation under the 1882 federal

statute required proof of "living together as man and wife." That status, the Court declared, "includes sexual intercourse." 131 U.S. at 187. Viewing sexual intercourse as an "incident" of the crime of cohabitation, the Court stated the governing rule as follows: "where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *Id.* at 188.

The Court then addressed the second obstacle to its application of the *Morey* test. In response to the argument that adultery requires proof that one of the parties is married, and cohabitation does not, the Court stated that the 1882 cohabitation statute was aimed at polygamy and "is construed by this court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives." 131 U.S. at 189. By construing the cohabitation statute in that way, the Court was able to conclude that the marriage element of the offense of adultery was in effect encompassed within the offense of cohabitation.

Thus, the Court concluded that all the elements of the offense of adultery were necessarily included within the offense of cohabitation, which rendered adultery in effect a lesser included offense of cohabitation. The Court's double jeopardy analysis in *Nielsen* is therefore entirely consistent with the *Morey-Blockburger* rule; accordingly, *Nielsen* does not remotely support petitioner's "same transaction" theory of double jeopardy or the decision of the Tenth Circuit in this case.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1992

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF THE RESPONDENT

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ISSUE PRESENTED FOR REVIEW

Whether a defendant may be prosecuted for a drug conspiracy after previously having been prosecuted for a substantive drug offense based on the same conduct that is alleged in the overt acts of the conspiracy charge.

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over twenty-five years ago to promote, study and research the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. The double jeopardy clause's bar against successive

prosecutions for the same offense is a fundamental right of citizens. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee. We believe that the adoption of the position taken by the Petitioner in the instant case would seriously undermine the Fifth Amendment guarantee against being twice put in jeopardy for the same offense.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. Both the Petitioner and the Respondent have consented to NACDL's participation as amicus curiae pursuant to Rule 37.3 of the Rules of this Court, and letters of consent have been filed with the Court.

SUMMARY OF THE ARGUMENT

The Respondent was previously prosecuted, convicted and sentenced for his conduct in connection with his efforts to establish a methamphetamine laboratory. The same conduct which was the basis for that prosecution was subsequently used by the government to prosecute, convict and sentence the defendant for conspiring to establish a methamphetamine laboratory. This is not a case in which the concern is simply with consecutive sentences for conduct which violates two criminal statutes and which were prosecuted in one case. Here, the issue involves the core concern of the double jeopardy clause: the right not to be twice tried for the same offense. The focus is not on Congressional intent in enacting two statutes which contain different essential elements, but on the conduct of the accused which the government proved as constituting the offense in both prosecutions. Because the same conduct was

the basis for both prosecutions, the latter prosecution was barred.

I. THE DOUBLE JEOPARDY CLAUSE BARS A PROSECUTION FOR CONSPIRACY TO MANUFACTURE METHAMPHETAMINE IF THE DEFENDANT WAS PREVIOUSLY PROSECUTED FOR ATTEMPTING TO MANUFACTURE METHAMPHETAMINE AND THE GOVERNMENT RELIES ON THE SAME CONDUCT TO PROVE BOTH OFFENSES

INTRODUCTION

The Double Jeopardy Clause has its genesis in Greek and Roman jurisprudence, Bartkus v. Illinois, 359 U.S. 121, 152 (1959)(Black, J. dissenting) and was firmly rooted in the common law of England. 4 W. BLACKSTONE, COMMENTARIES *335; Green v. United States, 355 U.S. 184, 187 (1957). It was elevated to the status of a "fundamental right" in Benton v. Maryland, 395 U.S. 784, 795 (1969): "Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice.'" Id. at 796. The underlying idea is that

> the State with all its resources and power should not be allowed to make

> repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. at 187.

The Double Jeopardy Clause embodies a number of protections for a criminal defendant. Though each of these protections can generally be characterized as ensuring that a defendant is not forced to run the gauntlet more than once for the same offense, the manifestations of this protection take many forms: The state may not retry a defendant if the appellate court determines that the evidence was insufficient in the initial trial. United States v. Burks, 437 U.S. 1 (1978). A new trial may not be

conducted if it follows a mistrial which results from intentional misconduct on the part of the state. United States v. Dinitz, 424 U.S. 600 (1976). A defendant may not be sentenced consecutively for the "same offense" even if prosecuted under separate criminal provisions. Blockburger v. United States, 284 U.S. 299 (1932). Following an acquittal, or a conviction the state may not again try the defendant for the "same offense." Green v. United States, 355 U.S. 184, 187 (1957). It is this latter protection -- barring a second trial for the "same offense" following a verdict and entry of final judgment -- which is at the crux of this case.

Within that category of cases, there are two recurring issues which have arisen in the last century: First, may the state retry the defendant under the same code section, but with different facts alleged? Ashe v. Swensen, 397 U.S. 436 (1970); Mars v. Mounts, 895 F.2d 1345 (11th Cir. 1990). Second, may the state

try the defendant for a different criminal offense which arose from the same criminal episode? Grady v. Corbin, 110 S.Ct. 2084 (1990). This case involves a unique combination of both of these issues. Here, the government has changed the code section under which the defendant is being tried -- first he was tried for attempt, second he was tried for conspiracy -- but relies on the same conduct as the basis for the prosecution. The other line of cases is also implicated here, because the government's effort to re-characterize the offense (from an attempt to a conspiracy) is an effort to change the operative factual allegations. Because the same criminal impulse, the same conduct, is the essence of both prosecutions, the second prosecution should have been barred.

If the facts of this case were analyzed under the standards employed to gauge the propriety of multiple punishments, the result might be different. But when analyzed under

the standards which are employed to gauge the propriety of successive prosecutions, the facts of this case lead to the conclusion that the second prosecution should have been barred. The Court of Appeals found that the government relied on the same conduct to prosecute the Respondent for the attempt offense as was used to prosecute him for the conspiracy. That is, his actual physical movements and state of mind were the subject of both the first and second prosecutions. The double jeopardy clause bars a subsequent prosecution where, as in this case, the government establishes an essential element of the second offense with conduct which constitutes an offense which was previously prosecuted.

A. EVOLUTION OF THE DOUBLE JEOPARDY BAR TO SUCCESSIVE PROSECUTIONS

The "same offense" issue in the context of successive prosecutions was raised over 100

years ago in In re Nielsen, 131 U.S. 176 (1889). The defendant pled guilty to unlawful cohabitation between October 15, 1885 and May 13, 1888. The second indictment charged Nielsen with committing the offense of adultery on May 14, 1888. This Court held the second indictment was barred. The test adopted by the Court was as follows:

> Where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

Id. at 188. The Nielsen rule, which applies to successive prosecutions, remains viable to this day. Brown v. Ohio, 432 U.S. at 163-64; Grady v. Corbin, 495 U.S. at ____. Noteworthy about the Nielsen case is that as a matter of law, all cases of cohabitation do not necessarily require proof of the offense of

adultery. Though the Court dwelled on this subject throughout the course of the opinion, the statutes in question clearly did not require, for a conviction of cohabitation, that the offender also be committing the offense of adultery. Sexual intercourse was a required element of each offense, but a single man could cohabit with two unmarried women and thereby commit the offense of cohabitation, but not adultery. Thus, Nielsen directs that it is not permissible to prosecute a person in successive prosecutions for the same conduct even if the second offense is not, as a matter of law, included in the first. That is, the adultery prosecution was barred because the cohabitation offense, as a matter of fact, relied on proof of the adulterous conduct, even though, as a matter of law, one may commit either offense, without also committing the other.

All cases involving the successive prosecutions for different offenses trace

their heritage to Neilsen. In the past twenty years, the principal cases in this area include, Brown v. Ohio, 432 U.S. 161 (1977), Harris v. Oklahoma, 433 U.S. 682 (1977), Illinois v. Vitale, 447 U.S. 410 (1980) and, finally, last term Grady v. Corbin, 495 U.S. ___ (1990). But before these cases were decided, the jurisprudence of double jeopardy was developed in another area -- consecutive sentencing -- which impacted on the development in this area.

B. THE DEVELOPMENT OF THE CONSECUTIVE SENTENCE RULE

With regard to consecutive punishments for offenses tried at one time, the rule which applies is different than the successive prosecution standard. In a consecutive punishment situation, the question is not whether the defendant is being tried twice, but whether he may be punished twice for the same offense. In essence, the question is

whether Congress intended a defendant to be punished twice for conduct which violates more than one offense. The rule for determining whether two offenses are the "same" was announced in Blockburger v. United States, 284 U.S. 299 (1932):

> Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 304. The defendant was prosecuted in one indictment, (1) for selling morphine hydrochloride not in or from its original stamped package; and (2) for selling morphine hydrochloride not in pursuance to a written order. With regard to these two counts, there was but one sale -- one act. This Court upheld the consecutive sentences on these two

counts because each offense had as an essential element a provision not shared by the other.

Had Blockburger adhered strictly to Nielsen, the result may well have been different, because, as noted, adultery and cohabitation each have an essential element not shared by the other; yet, the prosecution in Nielsen was barred. Blockburger and Nielsen are not irreconcilable, however. They simply apply in different situations, and thus, may result in different conclusions.

C. THE DEVELOPMENT OF COLLATERAL ESTOPPEL AS AN ADDITIONAL BAR

Apart from the Blockburger and Nielsen strands of the double jeopardy fabric, one more strand was developed in the case of Ashe v. Swenson, 397 U.S. 436 (1970). There, the Court held that a defendant who was charged and acquitted of robbing a poker player, could not later be prosecuted for robbing another

player in the game. In a decision which required the trial court to undertake a factual inquiry into what had been decided previously, the Court held that even though the first and second trial did not literally involve the same offense -- that is, there was, by necessity different facts which had to be proved -- the second trial was barred by the doctrine of collateral estoppel. Because the first jury must have found that Ashe had not participated in the robbery, that fact had been "decided" and no further prosecution was permissible which required that the fact be decided otherwise.

Ashe's concern with the "same offense" issue related to whether the same facts were the subject of both prosecutions. Though the offenses were clearly different -- Knight was the victim in prosecution 1, while Roberts was the victim in prosecution 2 -- the offenses were the same in one important respect: each case required proof as a matter of fact that

the defendant was at the scene of the crime and perpetrated the robbery. Because it was decided in prosecution 1 that Ashe was not at the scene, he could not be prosecuted in case 2 for being at the scene.

D. THE SUCCESSIVE PROSECUTION ISSUE RE-EMERGES TWENTY YEARS AGO

Thus, when the Nielsen line of cases -- the cases which involved successive prosecutions for the same "conduct" but different statutes -- emerged once again in the late 1970s, the landscape was not the same as it was when Neilsen was decided 100 years earlier. The Court was confronted with a maze of different standards -- the Blockburger standard, the Ashe v. Swensen standard and the Nielsen standard. Between 1977 and 1980, three cases were decided involving successive prosecutions for different offenses. In Brown v. Ohio, 432 U.S. 161 (1977), the Court was asked to decide whether a defendant could be

prosecuted for theft of an auto, after having already been convicted of joyriding. At the outset, the Court held that, "It has long been understood that separate statutory crimes need not be identical -- either in constituent elements or in actual proof -- in order to be the same within the meaning of the constitutional prohibition." Brown at 164.

In deciding whether successive prosecutions would be permitted, the Court began by analyzing whether the offenses were the same for consecutive sentencing purposes. That is, Brown began by looking to Blockburger for the answer to the question. The analysis ended at that point because the offenses were determined to be the same under the Blockburger test. Explicitly, the Court held that Blockburger was not the only test for deciding whether successive prosecutions would be permitted. 432 U.S. at 166 n.6. Brown recognized that overcoming the Blockburger hurdle was not the end of the matter. Failing

to overcome the Blockburger test, however, will be the end of the matter. If Blockburger is satisfied, the next question focuses on the facts of the case, rather than the elements of the offense. For there may be cases in which Blockburger may be satisfied -- that is, the offenses contain elements not common to each other -- but the prosecution is barred for other reasons.

In Harris v. Oklahoma, 433 U.S. 682 (1977), the defendant was convicted in a state court of felony murder. Later, he was prosecuted for armed robbery, the underlying predicate offense of the felony murder prosecution. The Court reversed, holding that in that case, the felony (armed robbery) was included, as a matter of fact, within the offense of felony murder, as proven. The two statutes, when read apart from the facts of the case, are not the same offense; clearly, armed robbery has elements which are not shared by the offense of murder, and vice

versa. But in that case, the armed robbery was a lesser included offense of felony murder, as proven. Harris, therefore, in the context of successive prosecutions under separate statutes, inaugurated the era of examining the facts of the case, rather than simply the code book, in determining whether a prior prosecution and conviction could bar a subsequent prosecution for the same conduct. It was a remarkably nonchalant beginning for this significant development in the law of double jeopardy: the per curiam opinion is a mere nine sentences long and cites as the principal authority In re Nielsen.[1]

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[1] The Court also cited Brown v. Ohio, decided less than two weeks earlier and Waller v. Florida, 397 U.S. 387 (1970), which involved issues which, if resovled, would have had a bearing on this case. In Waller, the defendant was prosecuted in municipal court for ordinance violations (disorderly breach of the peace and destruction of city property) and then prosecuted in the state court for grand larceny based on the same acts. The Court only decided that the municipal court and the state court were part of the same sovereign for double jeopardy purposes. The Court expressly refrained from deciding the question of whether the offenses were the same

Three years later, in Illinois v. Vitale, 447 U.S. 410 (1977), the Court acknowledged that the Blockburger test focused on the statute, without any regard to the particular facts of the case. Id. at 416. In Vitale, the defendant was found guilty of failing to properly slow down to avoid a collision. Later he was prosecuted for involuntary manslaughter, but the underlying offense was not determined. If the underlying offense which supported the involuntary manslaughter offense was failing to slow down, then the subsequent prosecution would face a considerable double jeopardy hurdle.[2] If, however, the state proved the involuntary manslaughter with proof of conduct other than

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for double jeopardy purposes: "Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question."

[2] Justice White did not specifically hold that in such a case, the subsequent prosecution would be barred; rather he wrote that the defendant's double jeopardy claim "would be substantial." Id. at 420.

the failure to slow down, then the prosecution could go forward. Because the conduct upon which the state planned to rely in the latter prosecution was not known, the state court erred in dismissing the indictment on the grounds of double jeopardy. The Court noted that under Harris, the appropriate inquiry was on the facts to be proved by the prosecution, not simply the codal elements of the offense.

E. GRADY V. CORBIN

Last term, this Court decided Grady v. Corbin, 495 U.S. ___ (1990), and held that the "substantial" double jeopardy claim envisioned by Justice White in Vitale was, in fact, a valid defense to a subsequent prosecution. The defendant committed a motor vehicle infraction which resulted in the death of another driver. He entered a guilty plea in Town Justice Court to the motor vehicle offense and then was indicted for manslaughter. The prosecutor filed a bill of

particulars identifying the three reckless acts which would be the basis for the homicide charge. Two of the three "acts" were the subject of the Town Justice Court convictions (Operating a vehicle in an intoxicated condition; failing to keep right of the median). Grady held that the second prosecution was barred by the double jeopardy clause. Again, the analysis begins, but does not end, with Blockburger. If the second prosecution fails the Blockburger test, the prosecution is barred; if Blockburger does not bar the second prosecution, then a second inquiry is undertaken: if the government, in order to establish an essential element of the offense will prove conduct that constitutes an offense for which the defendant has already been prosecuted, the prosecution is barred. 495 U.S. at _____.

Grady did not mark a dramatic departure from the settled double jeopardy law. Its result is virtually dictated by the decision

in In re Nielsen over a hundred years ago. It follows ineluctably from the decision in Harris v. Oklahoma. And it was explicitly foreshadowed in Illinois v. Vitale. Interestingly, in his otherwise comprehensive review of the historical precedents from the 18th and 19th century, Justice Scalia omitted any reference to In re Nielsen in his dissent to the decision in Grady. Nielsen clearly rejects the thesis advanced by Justice Scalia in that dissent. That is, even 100 years ago, successive prosecutions were barred even if, from a strictly legal point of view, one offense was not included in the other.

The reason that Blockburger is not the controlling test in successive prosecution cases is simple. Blockburger, is, in essence, a rule of statutory construction. It is a rule which seeks to divine whether Congress wanted a person to serve two consecutive terms for one act of selling drugs. Though it is couched in terms of double jeopardy and it has

been used as an aid in answering double jeopardy questions, it is primarily a test to be used in interpreting the will of the legislature. As the Court in Brown v. Ohio observed,

> "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. See Gore v. United States, 357 U.S. 386 (1958)."

432 U.S. at 165.

The double jeopardy clause is fundamentally a protection against twice being put to trial for the same offense. Grady recognizes that the Blockburger test suffocates the guarantee against double jeopardy if it, alone, is the test for determining whether successive prosecutions

are permitted. The prohibition against successive prosecutions is the core concern of the Double Jeopardy Clause. Congress can do nothing to curtail that right, though Congress can easily increase punishments or draft criminal legislation in a manner which will permit consecutive sentences for different offenses tried at the same time. But Congress can do nothing to facilitate the power of the government to repeatedly prosecute a person for one criminal act.

> The Fifth Amendment's prohibition against placing a defendant "twice in jeopardy" represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the

> Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.

United States v. Jorn, 400 U.S. 470 (1971). The importance of this component of the double jeopardy clause led the Court in Abney v. United States, 431 U.S. 651 (1977), to grant the defendant the right to appeal pretrial the denial of a motion to dismiss on double jeopardy grounds.

> Where successive prosecutions are at stake, the guarantee [of the Fifth Amendment Double Jeopardy Clause] serves 'a constitutional policy of finality for the defendant's benefit.' United States

v. Jorn, 400 U.S. 470, 479 (1971)(plurality opinion). That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, see Ashe v. Swensen, 397 U.S. 436 (1970) . . . and from attempts after a prior conviction and sentence, see Green v. United States, 355 U.S. 184 (1957).

Brown v. Ohio, 432 U.S. at 166.

F. UNITED STATES V. FELIX: CONTEMPORARY APPLICATION OF NEILSEN AND GRADY

Against this background -- the history of Neilsen, Brown, Harris and Grady v. Corbin, as well as the parallel (though sometimes perpendicular) historical development of the consecutive sentence rule of Blockburger -- the decision in the lower court in this case was correct.

What both the Tenth Circuit in this case and the Second Circuit in United States v.

Calderone, 917 F.2d 717 (2d Cir. 1990), recognized is that conspiracy prosecutions, and especially drug conspiracy prosecutions, rarely focus on the agreement between two people. See also United States v. Uselton, 927 F.2d 905 (6th Cir. 1991)(remanding case to the district court to determine whether prior conspiracy to violate Hobbs Act acquittal erected double jeopardy bar to trial for substantive Hobbs Act violation); United States v. Barrett, 933 F.2d 355 (6th Cir. 1991)(suggesting that Grady could bar successive conspiracy and attempt prosecutions for the same conduct; re-affirming, however, that consecutive sentences for the attempt and the conspiracy was permissible if the offenses were prosecuted together).

The archetypical drug prosecution focuses on the act which is the aim of the alleged conspiracy and the jury is asked simply to infer the existence of the agreement from proof of the completed or attempted offense.

And where, as here, the conduct of the defendant was previously used to convict the defendant of the substantive offense (or, as here, for attempting to commit the substantive offense), the government may not present the exact same evidence in a second prosecution for conspiracy. The government may prosecute the defendant for the substantive offense and the conspiracy in one trial and the court may impose consecutive sentences. But successive prosecutions for the attempted offense and the conspiracy are not permissible if the same conduct which supported the attempted offense is relied on to prove the conspiracy.

The use of the conduct of the defendant to prove his membership in the conspiracy is routine. Consider, for example, the standard Pattern jury instruction in criminal drug conspiracy cases:

> To prove the existence of a conspiracy, or an illegal agreement, the government is not required to

> produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding. . . .The government must prove that the defendant and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would [violate a law] by means of some common plan or course of action as alleged in Count ___ of the indictment. . .

DEVITT, BLACKMAR & O'MALLEY, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §28.04 (1990).

The instructions in the second prosecution of this case left the jury with no doubt that proof of the defendant's conduct was all that was really needed to support the conspiracy prosecution:

The agreement or understanding that constitute conspiracy need not take any particular form. It need not be in writing. The agreement or understanding may be expressed or may be wholly implied. It is not necessary to find an agreement expressed in words inorder to find a conspiracy. Now the Government is not required to prove a conspiracy by direct testimony or evidence. Ordinarily, a conspiracy can be proved only be inferences drawn from relevant and competent circumstantial evidence. However, the fact that a crime may have been committed does not mean there was a conspiracy to commit such crime. . . . The law allows you, as members of the jury, to infer the existence of a conspiracy from things actually done, taking the conduct of the

parties who are charged with the conspiracy. Thus, whether an unlawful conspiracy is proved is to be judged by what the parties actually did as well as the words they used.

(Transcript of Oklahoma trial, pp. 1073-75).

Significantly, the Court also directed the jury that the government was required to prove that the defendant engaged in overt acts in furtherance of the conspiracy (Oklahoma transcript pp. 1076-77) and it is conceded here that the overt acts which the government proved were the same acts which were the subject of the Missouri prosecution. Thus, there can be no argument that the conduct prosecuted in Missouri -- the acts of the defendant -- became an essential element of this prosecution: the overt acts of the conspiracy.

Even apart from the government's use of the same conduct to prove the existence of an

attempt in Missouri and the overt acts in Oklahoma, the appellate decisions in conspiracy cases have always focused on the defendant's conduct, his actions, to support a conspiracy conviction. In United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), the court held, characteristically, that if the government proves that a defendant was purchasing heroin from a middleman who he knew was participating in a large organization which parcels out various tasks among its members, the jury can conclude that the defendant agreed with those members even if he did not know their identities or locations. That is, the defendant's conduct, alone, is sufficient to establish his culpability for being a member of a conspiracy with members who he does not know. In United States v. Bridwell, 583 F.2d 1135 (10th Cir. 1978), the Tenth Circuit upheld a conspiracy conviction where the only proof was the defendant's repeated drug transactions. Over the course

of the last several years, every Circuit has upheld conspiracy convictions on the basis of the defendant's conduct, his participation in the transaction, and simply inferred the existence of an agreement. United States v. Iglesias, 915 F.2d 1524 (11th Cir. 1990) (defendant's participation in transaction supported conspiracy conviction); United States v. Cea, 914 F.2d 881 (7th Cir. 1990)(Defendant's participation in transaction supported conspiracy conviction); United States v. Chindawongse, 771 F.2d 840 (4th Cir. 1985)(Defendant's participation in transaction supported conspiracy conviction); United States v. Ospina, 739 F.2d 448 (9th Cir. 1984)(Defendant's participation in transaction supported conspiracy conviction); United States v. Medina, 887 F.2d 528 (5th Cir. 1989)(Defendant's participation in transaction supported conspiracy conviction); United States v. Sobamowo, 892 F.2d 90 (9th Cir. 1989)(Defendant's participation in transaction

supported conspiracy conviction); United States v. Sophie, 900 F.2d 1064 (7th Cir. 1990)(Defendant's conduct in selling drugs supported conspiracy conviction); United States v. Paiva, 892 F.2d 148 (1st Cir. 1989)(Defendant's conduct in selling drugs supported conspiracy conviction); United States v. Kelly, 892 F.2d 255 (3rd Cir. 1989)(Defendant's participation in manufacturing of drugs supported conspiracy conviction); United States v. Simpson, 901 F.2d 1223 (5th Cir. 1990)(Defendant's participation in drug transactions supported conspiracy conviction).

What these cases reveal is that the conduct of the defendant is the basis for the conspiracy charge in the same way that Thomas Corbin's driving too fast and crossing the center line was the basis for the manslaughter charge, and just as Mr. Neilsen's adulterous conduct was the same as his cohabitation conduct. Though the act of attempting to

manufacture narcotics is not, as a matter of law, an essential element of the offense of conspiring to do so, if the government proves the existence of the conspiracy solely by proving the attempt, then if the transaction was earlier prosecuted as an attempt, the subsequent prosecution is barred. As this Court observed two years ago, "In conspiracy cases, the agreement 'is all but synonymous' with the offense itself.'" United States v. Broce, 488 U.S. 563 (1989); United States v. Calderone, 917 F.2d 717, 721 (1989); see also Calderone, 917 F.2d at 725 (Newman, J. concurring)("in prior conspiracy prosecution, defendants were prosecuted for [the overt acts]").

Here the lower court held, as a factual matter, not as a legal matter, that the government relied on the same conduct in the first and second prosecutions to prove the

elements of the offense.[3] The same conduct was used to prove that the defendant attempted to commit the crime and to prove that the defendant committed overt acts in furtherance of the conspiracy to commit the crime. The government conceded in the second trial that the conduct to be relied upon in that trial "was the activity leading to defendant's conviction for attempted manufacture in the Western District of Missouri." United States v. Felix, 926 F.2d 1522, 1530 (10th Cir. 1991). The two indictments, when laid side by side, allege virtually the same facts, the Oklahoma indictment including the entire period of time alleged in the Missouri indictment. The Tenth Circuit found that the attempt offense in Missouri occurred from the Spring of 1987 through August 31, 1987, while

[3] The Tenth Circuit in this case, the Second Circuit in United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), and the Sixth Circuit in United States v. Uselton, 927 F.2d 905 (6th Cir. 1991), therefore, all agree that the issue presents initially a factual question.

the Oklahoma indictment alleged that the conspiracy lasted from "about" May 1, 1987, through August 31, 1987.

But of greater importance is the fact that the decision of the Tenth Circuit was not premised simply on the indictment, but on the proof at trial. It was the decision of that Court applying the Grady standard correctly, that the conduct prosecuted in Missouri and Oklahoma was the same. It was not simply a question of what evidence the prosecutor relied on in proving entirely different offenses; the evidence of Felix's purchase of supplies and chemicals was the crime, not simply evidence of the crime. That was the conduct which was prosecuted and for which he is being punished -- twice. The issue presented to this Court, therefore, is not whether the lower court erred as a matter of law, but whether it erred as a matter of fact in concluding that the same conduct was prosecuted in two successive prosecutions.

Here, unlike in Vitale, we are not simply speculating about what the "incidents" of the offense are. This is not a pretrial motion to dismiss, but an analysis of the incidents upon which the government actually did rely. Thus, unlike in Vitale, the appellate court could determine with precision, that the same incidents were presented in this case as in the earlier case.

The fact that Felix purchased precursors from the supplier may not be an essential element of the offense of conspiracy. It is the only evidence, however, that he did conspire with others. Thus, it is this conduct which is being prosecuted again. Furthermore, because the judge instructed the jury that an overt act had to be proved, that conduct was, at least in this prosecution, an essential element of the offense.

G. THE DECISION IN DOWLING IS NOT INCONSISTENT WITH GRADY OR THE POSITION ADVANCED BY RESPONDENT IN THIS CASE

The government's argument in this case misconstrues the fundamental distinction drawn by this Court in Grady between the same "evidence" and the same "conduct." The government's reliance on Dowling v. United States, 493 U.S. 342 (1990), demonstrates the flaw in their argument. For the issue in this case is not whether the government may introduce evidence of a prior crime, or introduce evidence which was earlier introduced in another trial. Dowling represents a limitation -- or perhaps a delineation of -- the scope of Ashe v. Swenson, not a limitation of In re Nielsen. The fact that Ashe had previously been acquitted of robbing one poker game did not mean that in a trial for robbing another poker game on a different occasion, evidence that he robbed the game for which he was tried and

acquitted could not be introduced. Thus, evidence of the conduct which led to an acquittal could be introduced in a trial for separate conduct. But according to Ashe, the conduct for which he was tried initially could not be the subject of a separate prosecution involving the same conduct.

The issue here is whether the government may prosecute Felix for the same conduct which was the subject of a prior prosecution. It is the conduct of Felix, the actions he took, which is the focus of the Grady-mandated analysis. Simply put, the question is whether Felix's purchase of precursor chemicals and negotiation to sell those chemicals can be the basis for two prosecutions. Grady directs that the answer to that question is no.

Dowling, on the other hand, is concerned simply with the admissibility of evidence. The same evidence may be introduced against a defendant countless times in consecutive prosecutions. That evidence may relate to an

instance of previously uncharged misconduct, a prior conviction, or conduct which led to a prior acquittal. What Grady directs, however, is that if the same conduct was the subject of a prior proceeding, that conduct may not be the subject of another proceeding.

To be sure, in examining the conduct which is the subject of the two prosecutions, care must be taken to ensure that the conduct is, in fact, the same before the double jeopardy bar applies. Thus, in Grady, if the prosecutor in New York alleged that it was the defendant's failure to pay attention which served as the predicate for the homicide offense, there would be no bar since it was other vehicular infractions which were previously prosecuted. That is, the fact that the defendant was prosecuted for "related" violations, violations which occurred contemporaneously with the failure to pay attention violation would not operate as a bar. Similarly, in Vitale, Justice White

pointed out that if another predicate offense was relied on, then there would be no bar to a subsequent prosecution. But the availability of other "conduct" to support a second prosecution does not change the fundamental rule that the same conduct cannot be the basis of the subsequent prosecution. The hypotheses in Vitale and Grady simply re-affirm the fundamental rule.

CONCLUSION

The evolution of double jeopardy jurisprudence in recent years has kept pace with the explosion of new criminal offenses which crowd the criminal code. Unlike the past, one criminal episode may subject the offender to a score of prosecutions. The Grady interpretation of the Fifth Amendment ensures that the goals of the protection as envisioned by the Constitution, are fulfilled. Those goals -- preventing the prosecution from being able to "rehearse" its proof for use in a later trial; preventing the defendant from

being subjected to repeated and costly trials and terminating the anxiety of a criminal defendant after one prosecution -- are meaningless if one criminal episode may be prosecuted over and over by the simple legerdemain of attaching a new label to the same conduct.

What Grady imported into the double jeopardy analysis was the necessity for a highly fact-intensive inquiry by the trial judge into the proof which the government intends to use in the upcoming trial. What conduct of the defendant is it that will be the focus of the prosecution? What did he do to violate the law? The focus of this inquiry has drifted far from the earlier preoccupation with the elements of the offenses which characterized the sterile Blockburger test. No longer does the trial court simply place the two statutes on top of one another and see if edges of each can be seen outside the boundaries of the other.

Yet, it is that type of mechanistic approach which the government urges the Court to adopt in this case: as in the old days, the government points out that a conspiracy offense requires only an agreement, while the substantive offense requires no agreement, but requires tangible conduct on the part of the offender. Therefore, the government argues, the defendant can be sentenced consecutively for the substantive and conspiracy offenses (a proposition which the NACDL does not dispute) and tried in successive trials (a proposition which the lower court in this case and the NACDL rejects). Grady dictates that the courts must embark on a more sophisticated factual inquiry before permitting a person to be tried repeatedly for the same conduct.

Frank Felix has been tried and convicted for his participation in the venture to manufacture methamphetamine. Once is enough.

Respectfully Submitted,

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